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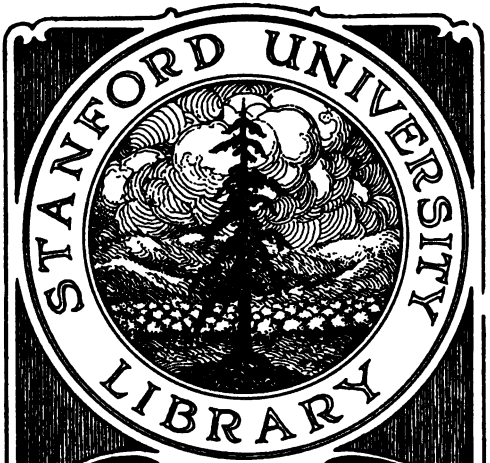

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HON. F. C. MONCREIFF,

Of the Inner Temple, Barrister-at-Law.

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PREFACE.

THESE pages do not profess to be a complete record of the jokes or humorous anecdotes connected with the English Bench and Bar. They are confined to those which appear to contain some of the elements of Wit and Wisdom, and rather to such incidents as are at once witty and wise than to those which come under only one of these heads. The field is immensely wide, and it is by no means easy in so small a compass to do anything like justice to it; for where there is so much which is admirable, the task of selection is a difficult one. On the other hand, it is not pretended that anything like a comprehensive outline of the subject is laid before the reader. Certain divisions have been selected, and under them there have been arranged what cannot be called more than specimens of the wealth of material which the diligent student

of legal and judicial history can find in more extensive works. It may be that the incidents given are somewhat like stones torn from their setting; for wise sayings and eloquent words often derive half of their value from the circumstances which surround them. I have endeavoured, however, to present them with as few of my own comments as possible, knowing that rich stones "are best plain set." For much that is in these pages I am indebted, as indeed every student of this subject must necessarily be, to Lord Campbell's invaluable "Lives of the Chancellors."

F. C. M.

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THE WIT AND WISDOM OF THE BENCH AND BAR.

CHAPTER I.

INTRODUCTORY.

Wit and Wisdom—Their Connection—Difficulty of Perpetuating—Wit and Law—Wit comes in Speaking—Discouragements to Wit—Nationality of Wit and Wisdom—Instances of Folly and Baseness in English Lawyers.

THE title of this book has two elements which so constantly intersect each other that they cannot well be dealt with as separate subjects. There are some plants which we cannot take up by the roots to see how they grow together without damaging them fatally; in like manner, any attempt to sever the wit from the wisdom of the English Bench and Bar must fail. They have flourished together, and they serve to illustrate and adorn each other. Still the two elements are distinct. Many sayings are witty, and yet are very far from being wise; while of perverted wit instances may be found without end in the transactions of such men as Jeffreys. On the other hand, there are, of course, many observations which, without being in the least witty, may be called wise. Such wisdom is most properly called commonplace, but most of the instances

of legal and judicial wisdom which are given in these pages are at once witty and wise in the highest sense of the words.

There have always been some more or less rough-and-ready methods of handing down the wisdom of past ages to posterity, and, imperfect as those methods have been, we are able to console ourselves with the thought that only the wisdom which will stand the test of time has filtered through them. But those who undertook to record the spoken wisdom of others often did injustice to it; and although we have heard of reporters who claim to have made the judicial reputation of judges, we do not forget that even the robust Johnson admitted that in his reports he always made the Whigs have the worst of it. Moreover, it is difficult to catch and retain wit, which is the salt or savour of wisdom. The short-hand writer may do his office to perfection, but it is impossible for him to reproduce faithfully the winged words of eloquence or the fresh sparkle of wit. A great portion of the wit of the Bar is expended during the process of cross-examination—an operation which it has been found impossible to resuscitate by means of the cold medium of print. But in spite of the fact that a vast amount of wisdom and wit is yearly lost to posterity by our imperfect means of retaining it, there still remains a large accumulation of matter in which the wisdom of great lawyers lies embedded.

There is no necessary connection between wit and law, but there is a popular impression, which is perhaps not without foundation, that lawyers are, as a

rule, more witty than other men. The lawyer, however, has no monopoly of wit. The truth is that he has to talk so much that it would reflect little credit on his understanding if he did not occasionally stumble upon a smart observation. A wittier man, or more effective speaker, than Bacon never adorned the English Bar, yet he spoke of his own nature in these terms:—"Knowing myself by inward calling to be fitter to hold a book than play a part, I have led my life in civil causes for which I was not fit by nature, and more unfit by preoccupation of mind." The lawyer says more wise and witty things, and also more foolish things, than other men by reason of the mere perpetuity of his speech; his eager tongue is never idle. Some have claimed for him a greater share of brains than is enjoyed by his fellow-men, and the claim is frequently put forward in exaggerated terms. Some years ago a learned Commissioner was trying the cases in the Crown Court at Leeds Assizes, when a juror in waiting who was bald complained that a severe draught was playing upon the top of his head. "Sir," said the Commissioner, "your window shall be shut, and the barristers' window opened. They, fortunately, have something outside as well as inside their heads. When we bring you here, we expect that you should not, and indeed we find that you do not, have any covering upon or lining within your head. But when we put you in the jury-box we do our best—sometimes with doubtful success—to supply the internal deficiency." These observations may or may not have been merited by the

chilled juror, but the possession of a wig and gown is unhappily no guarantee of a man's wit. The law, however, is, fortunately for the members of the Bar, uncertain—Lord Hardwicke once declared from the Bench that it would be very hard upon the profession if it were so precise that everybody knew it—and this uncertainty, which is probably as great in the present day as it was in the time of Lord Hardwicke, necessitates a great deal of argument and oratory; and wit and wisdom, though they may linger, at length seem to come to some counsel solely in consequence of their persistent efforts. A man cannot speak for ever without saying something good by accident.

On the other hand, the conditions under which the lawyer works are not altogether favourable to the cultivation of wit. The judge on the Bench, wrapped in a heavy gown and tippet, with his head surmounted by a ponderous wig, driven distracted by the prevarication of witnesses and the squabbles of counsel, cannot be expected to turn with a light heart to the manufacture of witticisms, or even words of wisdom. The position of counsel is hardly more likely to encourage the display of genius. While he is addressing the jury or the court, his solicitor on the one side and his junior on the other are busily plying him with suggestions, and possibly his client also endeavours to contribute to his perplexity. On a recent occasion a man, who had been incarcerated in an asylum as a lunatic, made his escape, and to some extent recovered his senses. Like many persons who have undergone a similar experience, he conceived an idea that he had been consigned

to the asylum from wicked and corrupt motives, and he brought an action against one of the medical men who had certified that he was a lunatic. The trial lasted several days, the counsel for the plaintiff endeavouring to believe and to prove that his client had never been anything but sane. It became his duty to open the proceedings on the fourth day of the trial by replying to the case for the defence, and he had taken his seat in court for that purpose, when a letter in the handwriting of his client was handed to him. The letter contained these words: "Your speech to the jury will tax your energies to the utmost. I enclose four postage stamps. Swallow them; they will have a truly marvellous effect upon your intellect."

There is no real distinction between the wisdom of different nations. What is wise in England is, generally speaking, wise at the Antipodes; but with wit it is otherwise. The wit of English lawyers is distinctly national. There are considerable resources of wit to be found in the annals of both the Scotch and Irish Bars; and these, again, are essentially national in their character. The wit of the Irish Bar seems to infect even the officers of the courts, and the people who enter the witness-box. It is impossible, for example, not to admire the fine irony of the usher who, when he was told to clear the court, called out, "All ye blaggards that are not lawyers lave the building." On a later page will be found some remarks upon the relations of judges and witnesses in England; but Irish judges have much greater difficulties to contend against, because the people with whom they have to

deal have a fund of ready retort. "Sir," said an exasperated Irish judge to a witness who refused to answer the questions put to him, "Sir, this is a contempt of court." "I know it, my Lord, but I was endeavouring to concale it," was the irresistible reply.

People may think with Junius that "allowance should be made for a Scotchman," or with Sidney Smith that a joke is a serious thing in Scotland; but the fact remains that there is a rich vein of dry wit in the sayings of Scottish lawyers. The oft-told tale of John Clerk and the Lords of Session is thoroughly characteristic. The Lords had given a judgment which excited the wrath of a young and intemperate counsel, who roughly told them that he was surprised that they should give such a judgment. Thereupon they put their heads together, and deliberated whether they ought not to commit the counsel to the Tolbooth for his presumption. John Clerk, however, who was an advocate of no mean wit, and had waged war upon the judges for many years, appeased them by remarking: "My Lords, if my young friend had known your Lordships as well as I do, no decision which your Lordships may please to give could possibly astonish him." The same John Clerk afterwards became a judge, under the title of Lord Eldin. When the Lords of Session welcomed him to the Bench, some reference was made to the fact that he had waited a long time for the distinction. "Well, you see," was the reply, "I did not get 'doited' just so soon as the rest of you." The nationality of Scotch and Irish wit is distinctly marked, the tone of the one being

humorous and dry, that of the other sparkling and boisterous; we do not, however, profess to take any notice of them in these pages. The wit of English lawyers is perhaps less distinctly national, but it will be found to be more lively than that of their Scotch brethren, and more sedate than the drollery of Irish genius.

The wit and wisdom of the English Bench and Bar have sometimes unfortunately been accompanied by a good deal of folly and baseness, and a book which dealt with the latter subjects might possibly be more amusing than, and certainly as instructive as, one which treats of the more favourable aspects of the English Bar. The contrast is very strong, and it is, in a measure, impossible to thoroughly understand the virtues without also glancing at the vices of English lawyers. The Great Seal seems to have been the ruin of many great men. Lord Bacon set his heart on it from the day he was called to the Bar, and in the struggle for its attainment fell into many discreditable, if not infamous, proceedings. While he was still unsuccessfully intriguing for the office of Solicitor General, he kept repeating to himself, "I must still be next the door." When he had risen to the height of his ambition, and fallen from it, he ruefully said, "If this be to be a Chancellor, I think that if the Great Seal lay upon Hounslow Heath nobody would take it up." Sir Thomas More, when he was installed as Chancellor in succession to Wolsey, whom he styled "the great Wether which is lately fallen," went on to speak of him as a man "of what singular wisdom, of what

notable experience; what a prosperous and favourable fortune he had for a great space, and how at last, dejected with a heavy downfall, he died inglorious." More himself fell a victim to his virtue. Jeffreys disgraced the profession to which he belonged, and came to a miserable end; but he was of bold aspect, and cared not for the countenance of any man. In all his wickedness there was no weakness or folly. For men of integrity like Lord Holt the Great Seal had little temptation. When it was offered to him, he replied, "I feel highly honoured by your Majesty's gracious offer; but all the time I was at the Bar I never had more than one cause in Chancery, and that I lost, so that I cannot think myself qualified for so great a trust." In Thurlow, again, the Chancellor who "swore his prayers," we find the love of office very strong. Lord Eldon affected to feel the dislike of the Great Seal which Bacon experienced after his fall. "No doubt," said he, "the world regards me as a prosperous and happy man; the prosperity I admit, but the happiness I deny." Yet he remained in the position of Chancellor for so many years that he was commonly known as the "Chancellor by prescription." In more modern times there has been often enough of folly and meanness among the members of the Bar. Folly is at all times rampant. We have the man who, when remonstrated with for taking less than a guinea from a prisoner in the dock, replies, "I took silver, it is true, but I did not disgrace the profession—I took the fellow's last farthing." There are not wanting in the records of the English Bar in-

stances of advocates who have read up their cases so negligently that they have actually found themselves arguing in court in favour of the party they were engaged to attack. We have also the man who, after conducting a defendant's case for some hours, rises to open it to the jury, and, turning his back on the jury-box, placidly addresses the benches occupied by attentive members of the public. There have been judges who crushed pertinacious counsel by saying, "Sit down, sir, your arguments are as devoid of justice as of law;" and counsel who, when asked for authority for their arguments, requested the ushers to bring them "some elementary treatise on the law of contract." The folly and perversity of such men may be exasperating, but they serve to throw into a brighter light the wit and wisdom of their fellows.

CHAPTER II.

JUDICATURE.

The Popularity of Judges—Their Divine Authority—Rules for Judicial Conduct—Knowledge of Law—Fresh Justice—Cheap Justice—Law and Equity—Precedent and Principle—Reasons.

ENGLISH judges have made no small part of the history of this country. They live and work in public, and incur popular admiration or abuse according to their merits. The reason of their popularity is plain. The English people owe to the judges the

structure of the social, commercial, and constitutional laws under which they live, and look to them for the maintenance of their liberties. Indeed, Lord Hardwicke most truly said, "I look upon the administration of justice as the principal and essential part of all government. The people know and judge of it by little else." Lord Bacon, who thoroughly understood what a judge ought to be, said that "a popular judge is a deformed thing, and plaudites are fitter for players than magistrates." But when he spoke thus he had in his mind the example of Sir Edward Coke, whom he cordially detested. A judge should surely be "more learned than witty, more reverend than plausible, and more advised than confident;" but he will not be popular unless he is worthy of his reputation.

The judicial office cannot be invested with too much dignity, especially when we regard the authority which it is designed to represent. According to Bacon, a judge "ought to prepare his way to a just sentence as God useth to prepare his way by raising valleys and taking down hills;" and again, judges ought "to imitate God, in whose seat they sit, who represseth the presumptuous and giveth grace to the modest." It was to this divine character of the judicial office that Lord Ellenborough somewhat profanely referred. An aged Peer was addressing the House of Lords on a very dry subject, and as he spun out his remarks to a tiresome length, the Chief Justice at last left the House, audibly exclaiming, "I am answerable to God for my time, and what

account can I give at the day of judgment if I stay here any longer?"

From the publicity of their position judges are exposed to criticism, which is not always either friendly or just, and therefore they have need to be more circumspect than men in other situations. Hale made many protestations of unwillingness to be a judge, "whose carriage will be strictly observed, easily misrepresented, and severely censured, according to variety of interests;" adding, "and I have still observed that almost in all times, especially upon changes, judges have been ever exposed to the calumny and petulancy of every discontented spirit." For their guidance many wise rules have been laid down, but it is curious that those who most clearly realised the duties of a judge often failed the most conspicuously in the performance of them. Perhaps the most luminous advice ever given to a judge was that delivered by Lord Bacon on swearing in Mr. Justice Hutton. He said:—

"Draw your learning out of your books, not out of your brain.

"Mix well the freedom of your own opinion with the reverence of the opinion of your fellows.

"Continue the studying of your books, and do not spend upon the old stock.

"Fear no man's face, yet turn not stoutness into bravery.

"Be a light to jurors to open their eyes, not a guide to lead them by the noses.

"Affect not the opinion of pregnancy and expedi-

tion by an impatient and catching hearing of the counsellors at the bar."

Here certainly are the chief principles of a judge's conduct. Some foolish people think it possible for men to be both great advocates and judges without much knowledge of either books or law. When Lord Erskine was Chancellor there was an impression abroad that he "knew no law," and two Americans who made a bet about the reversal of his decrees had the impertinence to refer the matter to the Chancellor himself. In his reply, that eloquent man said—

"To save you from spending your money upon bets you are sure to lose, remember that no man can be a great advocate who is no lawyer. The thing is impossible."

Again, there are others who think that a judge can know no law unless he is dull. According to some of his contemporaries, Lord Mansfield was too brilliant to be a sound lawyer, and amongst them were the two brother-serjeants, of whom

> "Each had a gravity would make you split,
> And shook his head at Murray as a wit."

Dr. Johnson's remark, if not conclusive, is at all events greatly to the point: "As to Lord Mansfield's not knowing law, you may as well say that a coachman who has driven a stage several times a day for twenty years between London and Brentford does not know the road." That great judge, while he mixed well the freedom of his own opinion, yet drew his learning out of his books, and was wont to say that since the

publication of Blackstone's Commentaries no student of law could be at a loss for reading. "There he may become acquainted with an uncouth, crabbed author, Coke upon Littleton, who has disgusted and disheartened many a tyro, but who cannot fail to please in the modern attire in which he is now decked out." The maxim of Sir Henry Finch that a law-student "ought to read all the morning and to talk all the afternoon," may be sound enough, but perhaps the enthusiasm of the uncouth, crabbed author carried him away when he wrote: "Hitherto I never saw any man of a loose and lawless life attain to any sound and perfect knowledge of the said laws; and on the other side, I never saw any man of excellent judgment in the laws but was withal (being taught by such a master) honest, faithful, and virtuous. . . . . Wherefore a great lawyer never dies *improlis aut intestatus*, and his posterity continue to flourish to distant generations."

Lord Tenterden used to say of Lord Truro that he had "industry enough to succeed without talent, and talent enough to succeed without industry;" but the epigram is more happy than true. The fruits of industry are inseparable from, and often pass for, talent. The law is a jealous mistress, demanding constant attention, and all the talent in the world unassisted by industry must fail to win her favours.

Much has been said and written about "affecting the opinion of pregnancy and expedition." It was the habit of Sir Nicholas Bacon, who was generally thought not to be as great a fool as he looked, to say,

"Let us stay a little, that we may have done the sooner;" and this was the principle upon which Lord Eldon somewhat indulgently regulated his judicial work. That eminent Chancellor himself says: "With Lord Bacon I confess I have somewhat of the cunctative, and with him I thought that whoever is not wiser upon advice than upon the sudden, the same man is no wiser at fifty than he was at thirty. I confess that no man ever had more occasion than I to use the expression which was Lord Bacon's father's ordinary word, 'You must give me time.' I always thought it better to allow myself to doubt *before* I decided, than to expose myself to the misery, *after* I had decided, of doubting whether I had decided rightly and justly." But his doubts and delays were matters of common talk, and in consequence Mr. Williams, afterwards Mr. Justice Williams, made an annual attack upon him in the House of Commons. These attacks annoyed the Chancellor exceedingly, and in describing one of them he wrote of his assailant: "He told a great many . . . which dissatisfied attorneys had thrown into his mouth, and a great many things which neither I nor any person interested about me ever heard before;" and "Can it possibly be endured that a barrister in an inferior rank of the profession is to hold a *surveillance* over the highest court of justice in the kingdom, and *de anno in annum* to attack the characters of the judges of that court, and call upon the judges themselves annually to explain their conduct, which he can't possibly understand?" In his own defence he said,

"As to what I hear of my *doubts* from persons who, having no doubts upon any subject, however intricate and difficult, set up as the *Ductores Dubitantium*, I console myself by recollecting what a most eminent Chancellor in France (D'Aguesseau) said to his son: 'The truth is I don't like to risk by velocity transferring property from those to whom it belongs to those who may apparently, but not really, have a title to it.'" Lord Lyndhurst, coming to the rescue on one occasion, said, "It has been often said in the profession that no one ever doubted his decrees, except the noble and learned lord himself," and Sir Samuel Romilly often observed that the tardy justice of the Chancellor was better than the swift injustice of his deputy. His doubts and delays were in many cases very scandalous; and perhaps an adequate idea of the extent to which justice was retarded and denied in the Court of Chancery may be found in a story told by the witty Mr. Jekyll to Lord Campbell. Shortly after Jekyll was called to the Bar, he happened to be in Westminster Hall, attired in wig, gown, and bands, when an attorney, with whose face he was not familiar, asked him to repair to the Court of Chancery to make a motion for him, tendering at the same time a fee. Jekyll was of course not displeased, but, as such things do not often happen without a reason, he ventured to ask his new client why he had selected him for the business. The solicitor replied, "Sir, I thought you had a sort of right to this motion, for the bill was drawn by Sir Joseph Jekyll, your great grand-uncle, in the reign of Queen Anne." Still

it is true, as Lord Hardwicke was wont to say of "Dirleton's Doubts," that some people's doubts are better than other people's certainties. Baron Alderson went to the root of the matter when he said, "This is the secret of getting on fast—namely, discarding all the fudge and nonsense of the case and coming to the real point;" but only a judge of the highest quality can do this with success. Judges of an argumentative turn of mind frequently draw off attention from the real point by unnecessarily chopping logic with the counsel at the bar, although more than two centuries ago Lord Bacon wrote in language which is familiar to every judge:—

"An over-speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar; or to show quickness of conceit in cutting off evidence or counsel too short: or to prevent information by questions, though pertinent. The parts of a judge in hearing are four: to direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence."

Sir Matthew Hale seems to have been a perfect judge in this respect. Burnet thus speaks of him: "He did not affect the reputation of quickness and despatch by a hasty and captious hearing of the counsel. He would bear with the meanest, and gave every man his full scope; thinking it much better to lose time than patience. In summing up evidence

to a jury, he would always require the Bar to interrupt him if he did mistake, and to put him in mind of it if he did forget the least circumstance. Some judges have been disturbed at this as a rudeness, which he always looked upon as a service and respect done to him." But he "held those who pleaded before him to the main hinge of the business, and cut them short when they made excursions about circumstances of no moment." In spite of all that has been said and written for centuries about delay and despatch, there is no doubt that economy of time was not understood by English judges until they were driven to it by the necessities of the nineteenth century. It is curious to find Lord Bacon referring to sources of delay which continued for two hundred years after he spoke. When he took his seat as Lord Keeper in the Court of Chancery there was "much ado, and a great deal of world," which he addressed in these terms:—

"I am resolved that my decree shall come speedily, if not instantly, after the hearing, and my signed decree speedily upon my decree pronounced. For it hath been a manner much used of late in my Lord's time, of whom I learn much to imitate and somewhat to avoid, that upon the solemn and full hearing of a cause nothing is pronounced in court, but breviates are required to be made, which I do not dislike in itself in causes perplexed. But yet I find, when such breviates were taken, the cause was sometimes forgotten a term or two, and then set down for a new hearing. I will promise regularly to pronounce my

decree within a few days after my hearing, and to sign my decree at least in the vacation after the pronouncing. *For fresh justice is sweetest.*

"Again, because justice is a sacred thing, and the end for which I am called to this place, and therefore is my way to heaven (and if it be shorter, it is never a whit the worse), I shall, by the grace of God, as far as God will give me strength, add the afternoon to the forenoon, and some fortnight of the vacation to the term, for the expediting and clearing of the causes of the court."

The justice given by English courts at the present day is, comparatively speaking, fresh; there is no scandalous delay, even in the Court of Chancery. But justice is not cheap, and until it becomes so its administration cannot be considered to be perfect. There are some who think that civil disputes cannot be adjusted without expense, and that nothing can be cheap without being at the same time nasty. In this spirit many lawyers opposed the County Court Bill of Lord Brougham as a mischievous and mistaken measure. Lord Lyndhurst, in criticising it, said: "He would freely admit that with the multitude this was a popular measure. Well it might be so. It promised cheap, it promised expeditious law. These were plausible topics—topics well calculated to catch the breath of popular opinion. But it should be borne in mind—and he trusted the country and their Lordships would think well upon it—that cheap law did not always mean cheap justice, nor expeditious law expeditious justice." It does not, however, follow

that justice may not be both cheap and expeditious; and this has been proved by the measure which Lord Lyndhurst denounced. In Lord Brougham's celebrated speech on Law Reform, delivered in 1828, the following passage occurs :—

"It was the boast of Augustus—it formed part of the glare in which the perfidies of his earlier years were lost—that he found Rome of brick and left it of marble: a praise not unworthy a great prince, and to which the present reign also has its claims. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap: found it a sealed book—left it a living letter; found it the patrimony of the rich—left it the inheritance of the poor; found it the two-edged sword of craft and oppression—left it the staff of honesty and the shield of innocence!"

The County Court Acts have no doubt opened the sealed book, and in a measure restored justice to the poor; but the time must come—slowly, perhaps—when cheap justice will be dispensed even in the superior courts of law. The practice and procedure at present in vogue in those courts, if they ultimately lead us to justice, do so by a circuitous route, and at an expense which no poor man can possibly afford. Still, we have made sensible progress, and the poor may now enjoy the relief given by the Divorce Court with the expenditure of a sum which is not prohibitive. If people in the humbler ranks of life desire to obtain a divorce, they must pay for it as for a very expensive luxury, but the cost is not such as to

exclude them from the court. The following memorable speech of Mr. Justice Maule, made in sentencing a man who had been convicted of bigamy at Warwick, refers to the state of things which existed before the creation of the present Divorce Court; it is a masterpiece of ironical wit:—

"Prisoner, you have been convicted upon clear evidence; you have intermarried with another woman, your lawful wife being still alive. You have committed the crime of bigamy. You tell me, and indeed the evidence has shown, that your first wife left her home and her young children to live with another man. You say this prosecution is an instrument of extortion on the part of the offender. Be it so. I am bound to tell you that these are circumstances which the law does not in your case take notice of. You had no right to take the law into your own hands. Every Englishman is bound to know that when a wrong is done, the law, or perhaps I should rather say the constitution, affords a remedy. Now listen to me, and I will tell you what you ought to have done. Immediately you heard of your wife's falsehood, you should have gone to an attorney and directed him to bring an action against the betrayer of your wife. You should have prepared your evidence, instructed counsel and proved the case in court; and recollect that it was imperative that you should recover—I do not mean actually obtain—substantial damages. Having proceeded thus far, you should have employed a proctor and instituted a suit in the Ecclesiastical Courts for a divorce

a mensâ et thoro. Your case is a very clear one, and I doubt not you would have obtained your divorce. After this step your course was quite plain; you had only to obtain a private Act of Parliament to dissolve your marriage. This you would get as a matter of course upon payment of the proper fees and proof of the facts; you might then have lawfully married again. I perceive, prisoner, that you appear scarcely to understand what I am saying to you, but let me assure you that these steps are constantly taken by persons who are desirous to dissolve an unhappy marriage. It is true, for the wise man has said it, that 'a hated woman when she is married is a thing that the earth cannot bear,' and that 'a bad wife is to her husband as rottenness to his bones.' You, however, must bear this great evil, or must adopt the remedy prescribed by the constitution of your country. I see you would tell me that these proceedings would cost you £1,000, and that all your small stock-in-trade is not worth £100. Perhaps it may be so. The law has nothing to say to that. If you had taken these proceedings, you would have been free from your present wife, and the woman whom you have secondly married would have been a respectable matron. As you have not done so, you stand there a convicted culprit, and it is my duty to pass sentence upon you. You will be imprisoned for one day."

The distinction which used to, and to some extent does still, exist between Law and Equity arose from the tenacity with which the old Common Law judges clung to precedents at the expense of principles. The

Common Law was supposed to be of purely English growth, and the judges who administered it refused to recognise any principle which it did not appear to sanction. This rigidity of the Common Law was relieved by the equitable authority of the Lord Chancellor, as Keeper of the King's Conscience; but the relief thus dispensed was in time bound down within limits as rigid as those which controlled the Common Law. From such beginnings the scandalous condition of things resulted in which Law and Equity were regarded as distinct principles, and what was justice on one side of Westminster Hall was injustice on the other. In no other country in the world has such an infamous distinction been maintained, and nowhere but in England have two jurisdictions, which recognised different principles of justice, been permitted to exist under the same roof. The result of the system was that for centuries a vast amount of doubtful pleasantry, wit, and ill-humour has been bandied backwards and forwards between members of the Chancery and Common Law Bars. When Sir Thomas More was Chancellor, he invited the judges to dine with him in the Council Chamber at Westminster, "where, after dinner, he broke with them what complaints he had heard of his injunctions, and moreover showed them both the number and causes of every one of them, in order so plainly, that upon full debating of those matters they were all enforced to confess that they, in like case, could have done no otherwise themselves." He then asked them if they were willing "by their own discretions to mitigate and

reform the rigour of the law themselves;" and, as they refused to do so, he said, "Forasmuch as yourselves, my Lords, drive me to that necessity for awarding out injunctions to relieve the people's injury, you cannot hereafter any more justly blame me." Lord Bacon speaks of a similar occasion on which he, as Chancellor, entertained the judges: "I plainly told them that for my part I would not suffer any, the least, diminution or derogation from the ancient and due honour of the Chancery; so if anything should be brought to them at any time touching the proceedings of the Chancery which did seem to them exorbitant or inordinate, that they should freely and friendly acquaint me with it, and we should soon agree; or if not, we had a Master (James I.) that could easily both discern and rule. At which speech of mine, besides a great deal of thanks and acknowledgment, I did see chear and comfort in their faces, as if it were a new world." The "chear," however, was very short-lived, and the prospect of a new world in Westminster Hall was clouded over for some centuries; for we find, about two hundred years after Lord Bacon's time, Lord Eldon speaking of the Common Law judges "with all possible respect." That distinguished judge was fond of telling how he once sent a case to the King's Bench and Common Pleas in succession, asking them what estate passed to trustees under a certain settlement. The former reported that the trustees took an estate in fee, the latter that they took no estate. Lord Eldon chose to think that both were wrong. "I held that the trustees took a chattel interest; and

what is more, my decision satisfied all parties." This kind of patronage was always spurned and resented by the Common Law judges. Thus, when a suitor, disappointed by the result of his case in the King's Bench, threatened to revenge himself by filing a bill in Chancery, Lord Kenyon said to him, "Go into Chancery then; *abi in malam rem.*" Hearing of this outburst, Lord Thurlow accosted the Chief Justice in these terms, "Taffy, when did you first think the Court of Chancery was such a *mala res?* I remember when you made a very good thing of it." Both Common Law judges and counsel professed the utmost ignorance of what went on in the Court of Chancery. They said, with some truth, that those who went into it seldom came out again. But the contempt was mutual. Lord Thurlow, when he was Chancellor, used to employ Mr. Justice Buller, a Common Law judge of great eminence, to sit for him in the Court of Chancery. On somebody suggesting to him that Buller knew nothing of Equity, he replied, "Equity! he knows no more of it than a horse, but he disposes somehow of the cases, and I seldom hear more of them." Lord Lyndhurst was never in a Court of Equity before he was elevated to the Bench, but he is represented by Lord Campbell as taking his seat as Chancellor in Lincoln's Inn, and rising at the end of his first day's work with the exclamation, "Bah! There is nothing in it."

But Equity in its true sense was administered in Common Law courts long before the Judicature Acts were passed, and without the intervention of the

King's Conscience. Many of the stiffest judges, who stuck to their precedents and eschewed principles, were apt enough on occasion "by show of antiquity to introduce novelty;" and thanks to the liberal tendencies of judges like Lord Mansfield, the Common Law underwent a considerable expansion towards the close of the eighteenth century. The infamous Jeffreys used to say that he "had as good a right to make precedents for succeeding times, as those who had gone before him to make precedents for him;" and he declared that "he was to make decrees according to his conscience, and every case was to stand upon its own bottom." Even the enemy of mankind can quote Scripture for his own ends, and Jeffreys, who was a man of strong common sense, understood the theories of justice as well as the most upright judge. We know, unfortunately, too well what he meant by making precedents for succeeding times, and judging each case upon its own bottom. The gentle Hale "did look upon Equity as part of the Common Law, and one of the grounds of it; and therefore, as near as he could, he always did reduce it to certain rules and principles, that men might study it as a science, and not think the administration of it had anything arbitrary in it." But it was not until the time of Lord Mansfield that the true relations of principle and precedent were recognised in the courts of law. Before his day the details of each commercial case were collected and thrown *en masse* at the heads of juries, who returned general verdicts. Lord Mansfield, taking up the

principles of the law, extended them to each case as it arose, and to his administration of true Equity we owe the commercial law of this country. Yet the great lawyers who practised in his court used to "shake their heads at Murray." It is somewhat curious at this time of day, when Law and Equity are one, to read the criticisms of the first Lord Redesdale. He said: "Lord Mansfield had on his mind prejudices derived from his familiarity with Scotch law, where Law and Equity are administered in the same courts, and where the distinction between them which exists with us is not known. . . . Lord Mansfield seems to have considered that it manifested liberality of sentiment to endeavour to give the courts of law the powers which are vested in Equity; that it was the duty of a good judge *ampliare jurisdictionem.*" This opinion was shared by Lord Kenyon and other distinguished lawyers. It is perfectly astounding to the modern mind that a desire to make justice complete should be treated as a prejudice. But Lord Redesdale did not even do his subject justice. Lord Mansfield himself said: "General rules are wisely established for attaining justice with ease, certainty, and despatch. But the great end of them being to do *justice*, the court are to see that it be really attained. What I have suggested seems to be the true way to come at justice, and what we ought therefore to do; for the genuine test is *boni judicis ampliare justitiam*, not *jurisdictionem*, as it has often been cited." In advising the House of Lords in the case of the Queensberry Leases, Lord Eldon said: "All law ought to stand upon

principle; and unless *decision* has removed out of the way all argument and all principle, so as to make it impossible to apply them to the case before you, you must find out what is the *principle* upon which it must be decided;" and Lord Justice Knight Bruce very lucidly enforced the same rule in *Boyse v. Rossborough.* "Decisions must be considered not as having *created* (which they could not), but as having *obeyed* law: that is to say, unwritten law. Upon questions, however, of unwritten law the force of authorities and precedents is not confined to cases of which all the circumstances, however accidental, agree with theirs—to instances as like as Apis Api. . . . We should otherwise, indeed, be in a dark and strange state."

There was a time when wise men were wont to say that "Equity follows the Law." It may be so in a certain sense, but it has been lately enacted that the rules of Equity shall prevail, which, indeed, is a partial declaration of the immortal truth that no number of decisions can override one principle of justice.

It has been said, partly in truth and partly in irony, that a wise man never gives reasons; and wise judges have been known to act on the maxim to a considerable extent. On one occasion Chief Justice Holt disposed of a case, saying, "Judgment in this case will be for the defendant, and as for reasons, there will be none." It came, however, gradually to be realised in time that it was the part of a good judge to give his reasons, not only for the satisfaction of suitors but for the benefit of the Bar, the members of which are entitled to be informed of the principles upon which

the judges proceed. For example, it used to be the custom of the Common Law judges, when cases were sent to them from the Court of Chancery, to answer privately to the Chancellor. Lord Mansfield, however, in such cases delivered his opinion in open court, and gave the reasons upon which it was grounded. Lord Kenyon returned to the old custom, because (according to Lord Campbell) the Chancellor used to jeer at his reasons. Some light is thrown upon the value of Lord Eldon's reasons by the following story which he himself used to tell:—"After dinner one day, when nobody was present but Lord Kenyon and myself, Lord Thurlow said, 'Taffy, I decided a cause this morning, and I saw from Scott's face that he doubted whether I was right.' Thurlow then stated his view of the case, and Kenyon instantly said, 'Your decision was quite right.' 'What say you to that?' said the Chancellor to me. I said, 'I do not presume to form a judgment upon a case in which you both agree; but I think a fact which may be material has not been mentioned.' I was about to state the fact and my reasons. Kenyon, however, broke in upon me, and with some warmth stated that I was always obstinate, and there was no dealing with me. 'Nay,' interposed Thurlow, 'that is not fair. You, Taffy, are obstinate, and give no reasons; you, Jack Scott, are obstinate too, but then you give your reasons, and very bad ones they are.'"

It may be difficult in some cases to arrive even at a just decision, for when both sides have been heard, the lay mind is naturally perplexed; and to give not

only a just judgment, but the reasons for it, is an ordeal which only highly-trained intellects can pass through with impunity. The advice therefore which Lord Mansfield gave to a military officer who had been appointed Governor of a West India island may be taken as exceedingly wise. It seems that the newly-appointed Governor was not unnaturally somewhat dismayed by the prospect of having to sit as Chancellor of his island and decide causes. The Chief Justice endeavoured to reassure him, saying, "There is no difficulty—only hear both sides patiently, then consider what you think justice requires, and decide accordingly; *but never give your reasons, for your judgment will probably be right, but your reasons will certainly be wrong.*" The sequel to this conversation was told by Lord Mansfield himself in these words:—"I was two or three years afterwards sitting at the Cockpit upon plantation appeals, when there was one called from my friend and pupil, the General, which the losing party had been induced to bring on account of the ludicrously absurd reasons given for the judgment; and, indeed, they were so absurd that he incurred some suspicion of corruption, and there was a clamour for his recall. Upon examining it, however, I found that the judgment was perfectly sound and correct. On expressing a regret that my advice had been forgotten, I was told that the General, acquiring reputation by following it, began to suppose himself a great lawyer; and that this case brought before us was the first in which he had given his reasons, and was the first appealed against."

CHAPTER III.

JUDICATURE.

The Corrupt Judge: Bacon—The Incorruptible Judge: More, Hale, Eldon—The Independent Judge: Coke, Sir W. Jones, Holt, Thurlow.

It is one of the highest merits of the English judges of this century that they are above even the suspicion of a bribe. On a recent occasion an infatuated plaintiff, when under examination, expressed his belief that his solicitor had subsidised the Lord Mayor and the Common Serjeant. The information was met with an amused irony, and indeed any suggestion that an English judge is open to a bribe is only worthy of ridicule. When we glance back a few hundred years, the reality of our social progress comes forcibly home to us. In Wolsey's time "no one could hope for a favourable judgment unless his fingers were tipt with gold."

Lord Bacon, however, furnishes a glaring instance of a corrupt judge—an instance all the more remarkable because out of his lips came the most beautiful sentiments of judicial purity. In 1621 he was charged with corruption, and, the charge being made good and confessed, was sentenced to fine, degradation, and imprisonment. The charge was made by one Aubrey, who said that "having a suit pending in the Court of Chancery, and being worn out by delays, he had been

advised by his counsel to present £100 to the Chancellor, that his cause might by more than ordinary means be expedited; and that in consequence he had delivered the money to Sir George Hastings and Mr. Jenkins of Gray's Inn, by whom it was presented to his Lordship; but notwithstanding this offering, the Chancellor had pronounced a killing decree against him." Bacon seems to have tried to deceive his own mind as to the corruption of such dealings. He who would "bind even the hands of suitors from offering," and "avoid not only the fault, but the suspicion," wrote in his notes, made preparatory to an interview with the King, "The law of Nature teaches me to speak in my own defence. With respect to this charge of bribery I am as innocent as any born on St. Innocents' Day; *I never had bribe or reward in my eye or thought when pronouncing sentence or order.*" Yet he wrote openly to the King, "For the briberies and gifts wherewith I am charged, when the book of hearts shall be opened, I hope I shall not be found to have the troubled fountain of a corrupt heart in a depraved habit of taking rewards to pervert justice; *however, I may be frail and partake of the abuses of the times;*" and, in conclusion, "I rest as clay in your Majesty's gracious hands." When the bitterness of his degradation was over, he repeatedly tried to soften the heart of the King, and even affected to jest on the subject of his offence. Once, with questionable pleasantry, he wrote:—"Because he that hath taken bribes is apt to give bribes, I will go further, and present your Majesty with a bribe; for if your

Majesty give me peace and leisure, and God give me life, I will present you with a good History of England and a better digest of your laws." Two years after, when all hope of return to power was gone, he wrote less affectedly: "Of my offences, far be it from me to say, *dat veniam corvis; vexat censura columbas;* but I will say that I have good warrant for, they were not the greatest offenders in Israel, upon whom the tower of Siloam fell. . . . I would live to study, and not study to live; yet I am prepared for *date obolum Belisario,* and I that have borne a bag can bear a wallet." Thus he, whose wit and wisdom have never been surpassed, either on the Bench or at the Bar, became the most signal instance of a judge degraded for meanness and corruption.

Jeffreys, when he was Chancellor, used to say, "It will be found that I have done the part of an honest man; but as for the judges, they are most of them rogues." The general condemnation was probably just, considering that the judges were for the most part creatures of the Chancellor's promotion; but, with a strange mixture of impudence and irony, he excepted himself from the censure. It is a remarkable fact that, in the midst of the judicial corruption which prevailed under the Tudors and Stuarts, while judges systematically and notoriously took bribes from the suitors who came into their courts, the theory of judicial purity was generally accepted and publicly avowed. Lord Keeper Williams is said to have "stood upon a rule made by his own wisdom—that a judge must not pay a bribe or take a bribe," and in practice there

were one or two brilliant exceptions to the general corruption of the times. Sir Thomas More acted up to the morality which he professed. In the time of his predecessors no man could penetrate to the presence of the Chancellor without unlocking the doors with a golden key. More, however, was open to all who were suitors in his court; and when his son-in-law ruefully complained that he missed the fees which he might have earned by procuring introductions for anxious suitors, returned the following answer:—"I do not mislike, son, that your conscience is so scrupulous, but there be many other ways wherein I may both do yourself good and pleasure your friends: for some time, by my word, I may stand your friend in stead; some time I may help him greatly by my letter; if he hath a cause depending before me, I may hear it before another at your entreaty; if his cause be not all the best, I may move the parties to some reasonable end by arbitrament. But this one thing I assure thee, on my faith, that if the parties will at my hands call for justice and equity, then although it were my father, whom I reverence dearly, that stood on the one side, and the Devil, whom I hate extremely, were on the other side, his cause being just, the Devil of me should have his right." But corruption was so much a matter of course that even Sir Thomas More was charged by a disappointed suitor with having accepted a gilt cup from the wife of the successful litigant. Being summoned before the Council, he admitted that he had accepted the cup as a new year's gift, but—on Lord Wiltshire crying out triumphantly,

"Lo, did I not tell you, my Lords, that you would find this matter true?"—he added, "My Lords, hear the other part of my tale. After having drunk to her of wine, with which my butler had filled the cup, and when she had pledged me, I restored it to her, and would listen to no refusal."

Sir Matthew Hale went still further, for he was at great pains to "avoid not only the fault, but the suspicion." When he was Lord Chief Baron, he tried, on the western circuit, a cause in which the plaintiff was a country gentleman, whose ancestors had been accustomed from time immemorial to send a buck to the judges. The buck had been sent as usual, but when the case was called, the following conversation took place:—

L. C. Baron: Is this plaintiff the gentleman of the same name who hath sent me venison?

Judge's Servant: Yes, please you, my Lord.

L. C. B.: Stop a bit then. Do not yet swear the jury. I cannot allow the trial to go on till I have paid him for his buck.

Plaintiff: I would have your Lordship to know that neither myself nor my forefathers have ever sold venison, and I have done nothing to your Lordship which we have not done to every judge that has come this circuit for centuries bygone.

L. C. B.: That is nothing to me. The Holy Scriptures say, "a gift perverteth the ways of judgment;" I will not suffer the trial to go on till the venison is paid for. Let my butler count down the full value thereof.

Plaintiff: I will not disgrace myself and my ancestors by becoming a venison-butcher. From the

needless dread of selling justice, your Lordship delays it. I withdraw my record.

The same judge once presided at the assizes at Aylesbury, when Sir John Croke prosecuted for robbery a clergyman who had gone to his house to collect tithes. Sir John had sent to the judge's lodgings two loaves of sugar, which Hale ordered to be returned. The case having come on for trial, and the clergyman being acquitted, the following scene took place :—

L. C. B. : Is Sir John Croke gone? Gentlemen, I must not forget to acquaint you—for I thought that Sir John Croke had been here still—that this Sir John Croke sent me this morning two sugar-loaves for a present. I did not then know so well as now what he meant by them; but to save his credit I sent his sugar-loaves back again. Mr. Clerk of Assize, did you not send Sir John his sugar-loaves back again?

Clerk of Assize : Yes, my Lord, they were sent back again.

L. C. B. : I cannot think that Sir John believes that the King's justices come into the country to take bribes. I rather think that some other person, having a design to put a trick upon him, sent them in his name. Gentlemen, do you know this hand? (showing to the gentlemen of the grand jury the letter which accompanied the sugar).

Foreman : I fear me it is Sir John's, for I have often seen him write, doing justice along with him; and your Lordship may see that it is the same with this *mittimus*, written and signed by him.

L. C. B. (putting the letter back into his bosom): I intend to carry it with me to London, and will relate the foulness of the business as I find occasion.

It was known among his contemporaries that Hale's desire to avoid the suspicion amounted almost to a weakness, and in consequence he sometimes fell a prey to the crafty. A courtier, who had a cause to be tried before him, and knew the indignation which he felt towards those who attempted to corrupt him, "got one to go to him as from the King, to speak for favour to his adversary, and so carried his point; for the Chief Justice could not think any person to be in the right that came so unduly recommended." In the following century the Mayor of Yarmouth, having been threatened with proceedings respecting a will, wrote to Lord Hardwicke, enclosing a bank note for £20, for the "extraordinary trouble" of looking at the will. Being brought before the court, he declared that he had acted "through ignorance." He was discharged on consenting that the £20 should be distributed among the poor prisoners of the Fleet Prison. Perhaps Lord Eldon was most happy in his treatment of such persons. A Welshwoman once sent him a goose by way of a bribe, expressing at the same time a hope that the present would not induce him to favour her. The Chancellor replied that, as he was a judge, she might as properly have applied to her goose for advice as to him. That the judges still maintain a tolerably strict standard regarding the influence of eatables and drinkables on the adjudicating mind may be gathered from the fact that the Queen's Bench

Division recently set aside an award in a compensation case, because the claimant had given the jury a champagne luncheon.

Men scarcely realise in these days how much English liberty is due to the fearless independence of judges. There have been occasions when kings and governments tried to rule in this country by usurping the administration of justice, and it is only too true that the grossest cruelty and oppression have been inflicted by the English Bench, at the instigation either of the Court or its political partisans. Under the Stuarts the puisne judges were feeble in capacity and servile in character. As a rule, they rarely ventured to hazard an opinion contrary to that of their chief; but the Court was even more paramount in their affections than the Chief Justice. Frequently that high functionary himself rose to power by a devout cultivation of the wishes of the King, and, as Sir Thomas More said, "the eye of a king's courtier can endure no colour but one, the King's livery hindering his sight." Of this kind of judge Jeffreys was the most infamous example; but fortunately for this country the office of Chief Justice was sometimes held by men of rare learning and ability, combined with unflinching independence. Of these not the least was Sir Edward Coke, who, in spite of his rough, overbearing manner, was a great patriot and defender of the laws. One of the ridiculous schemes which James I. harboured in the early part of his reign was that of dispensing justice in person to his subjects. Accordingly he began by hearing "a controversy of

land," but the sentence which he gave "was repealed, for this, that it did belong to the Common Law." Full of his ill-timed conceit, the King summoned the judges to his presence.

King James: I think that the law is founded on reason, and I and others surely have reason as well as the judges.

Coke, C. J.: True it is, please your Majesty, that God has endowed your Majesty with excellent science as well as great gifts of nature; but your Majesty will allow me to say with all reverence that you are not learned in the laws of this your realm of England, and I crave leave to remind your Majesty that causes which concern the life or inheritance, or goods or fortune, of your subjects are not to be decided by natural reason, but by the artificial reason and judgment of the law; which law is an art which requires long study and experience before that a man can attain to the cognisance of it. The law is the golden met-wand and measure to try the causes of your Majesty's subjects, and it is by the law that your Majesty is protected in safety and peace.

King James (in a great rage): Then I am to be under the law, which it is treason to affirm.

Coke, C. J.: Thus wrote Bracton, "*Rex non debet esse sub homine sed sub Deo et lege.*"

King James did not attempt to put his powers further to the test, but on one or two occasions he occupied a seat in court with a view to seeing whether he could perform the duties of a judge. Some time after doing so he admitted his incapacity, saying, "I could

get on very well hearing one side only, but when both sides have been heard, by my saul I know not which is right." Convinced of the impossibility of practising kingcraft in this way, he endeavoured to pervert the course of justice by other means. It had been the habit of the Crown to issue from time to time proclamations with reference to the enforcement of the law and the regulation of police matters. This habit James proceeded to abuse by making proclamations which amounted to positive amendments of the law. The Commons promptly took up the matter, and presented an address to the King, who proceeded to take the opinions of the judges. Answering for them, Coke said: "The law of England is divided into three parts —Common Law, Statute Law, and custom; but the King's proclamation is none of them. Also *malum aut est malum in se, aut malum prohibitum;* that which is against Common Law is *malum in se; malum prohibitum* is such an offence as is prohibited by Act of Parliament. Also it was resolved that the King hath no prerogative but that which the law of the land allows him." Assuredly these are not the words of a man whose eyes could only endure the colour of the King's livery. For himself, the Chief Justice added, "*Ubi non est lex, ibi non trangressus; ergo,* that which cannot be punished without proclamation cannot be punished with it."

In Peacham's case the same judge made a stand against the unconstitutional proceedings of the Crown. Peacham was an aged clergyman of Somerset, of great piety, but inclined to take the popular cause.

His study was broken into, and a sermon discovered which, although it had never been preached, was supposed to reflect upon despotic government. He was arrested, and examined before the Attorney-General, Sir Francis Bacon, and other men in high office upon interrogatories put to him "before torture, in torture, between torture, and after torture." The object was to extract information which would support a prosecution for treason, in which, however, for a time, no progress was made. According to Bacon, Peacham's "raging devil seemed to be turned into a dumb devil." An attempt was then made to poison the minds of the judges, and obtain from them an assurance that they would uphold a prosecution for treason. For carrying out this scheme each judge was assigned to different minions of the Crown, who were told that "they should not in any case make any doubt to the judges—as if they mistrusted they would not deliver any opinion apart—but should speak resolutely to them." The Attorney-General reserved Coke for himself, and had several interviews with him, handing over the papers relating to Peacham's case, and a number of carefully-selected precedents. The puisne judges offered no resistance, but Bacon, describing to King James his interview with Sir Edward Coke, says: "He fell upon the same allegation which he had begun at the council-table, 'that judges were not to give opinions by fractions, but entirely according to the vote, whereupon they should settle upon conference, and that this auricular taking of opinions, single and apart, was new and dangerous;' and other

words more vehement than I repeat." At length, having "in some dark manner put him in doubt that he shall be left alone," and argued that, if the King, "upon his own princely judgment, and for reasons of estate," required the advice of his judges he was entitled to receive it, he induced Coke to give his opinion, and wrote to the King, "I send your Majesty enclosed my Lord Coke's answers; I will not call them rescripts, much less oracles. They are of his own hand." Peacham was tried and found guilty but he died in prison from the effects of the torture which he underwent.

A similar conflict arose in the case of Commendams. It happened that in the course of a trial counsel had been permitted to question, with some freedom, the right of the Crown to grant ecclesiastical preferments to be held with bishoprics. The matter having been reported to the King, Sir Francis Bacon was ordered to write to the Chief Justice, requesting that there should be no further argument in the case until the King's pleasure should be known. Coke declined to pay any attention to this command, and judgment was accordingly given without delay. Thereupon the Chief Justice and the twelve other judges were summoned to Whitehall and rebuked by his Majesty. The whole matter was gone into at the council-table, and, referring to the answer which the judges had sent, "His Majesty noted that it was a new thing, and very indecent and unfit, for subjects to disobey the King's commandment, but most of all to proceed in the meantime and return to him a bare

certificate; whereas they ought to have concluded with the laying down and representing of their reasons modestly unto his Majesty, why they should proceed, and so to have submitted the same to his princely judgment, expecting to know from him whether they had given him satisfaction.

"After this, his Majesty's declaration, all the judges fell down upon their knees, and acknowledged their error, for matter of form, humbly craving his Majesty's gracious favour and pardon for the same.

"But for the matter of the letter the Lord Chief Justice of the King's Bench entered into a defence thereof; the effect whereof was that the stay required by his Majesty was a delay of justice, and therefore contrary to the law and the judges' oath. Unto which answer of the Chief Justice his Majesty did reply that for the last conceit it was mere sophistry, and that for them to discern whether the case concerned the King's prerogative, without consulting his Majesty first, and informing his princely judgment, was a thing preposterous."

The Attorney-General (Bacon), having given his opinion, and the rest of the learned counsel having consented to it, "the Lord Chief Justice, answering nothing to the matter, took exception that the King's counsel learned should plead or dispute with the judges; for, he said, they were to plead before the judges, and not to dispute with them.

"Thereupon his Majesty and the Lords thought good to ask the judges severally their opinion, the question being put in this manner: whether if at

any time in a case depending before the judges which his Majesty conceived to concern him, either in power or profit, he thereupon required to consult with them, and that they should stay proceedings in the meantime, they ought not to stay accordingly?

"They all (the Lord Chief Justice only except) yielded that they would, and acknowledged it to be their duty so to do. Only the Chief Justice of the King's Bench said for answer, 'When that case shall be, I will do that which shall be fit for a judge to do.'"

Such was the fearless and independent character of this great lawyer, at a time when even judges could not speak in favour of liberty and justice without danger to their heads.

Attempts have also been made by both Houses of Parliament to overawe the judges, and encroach upon their right to administer justice upon the true principles of law. In 1628 Sir William Jones was summoned with the other judges before the House of Lords, to answer for a decision which he had given. Sir William stood upon his constitutional right as a judge, and maintained that he was responsible only to God and his conscience for his conduct on the Bench, adding, "I am myself *Liber Homo.* My ancestors gave their voice for Magna Charta. I enjoy that house still which they did. I do not now mean to draw down God's wrath upon my posterity, and therefore I will neither advance the King's prerogative nor lessen the liberty of the subject to the danger of either King or people." Chief Justice Holt was also summoned before the same assembly, and conducted himself with

equal independence. One Charles Knowllys, an indictment for murder having been found against him, pleaded privilege of peerage, on the ground that he was Earl of Banbury. Against this plea was brought forward a judgment of the House of Lords, *secundum legem et consuetudinem Parliamenti*, but which had not been given on a reference from the Crown. As to the averment that the judgment was according to the law and custom of Parliament, Holt said: "I know no reason for its introduction by the King's counsel, unless they thought to frighten the judges; but I regard it not; for though I have great respect and deference for the Houses of Parliament, yet I sit here to administer justice according to the law of the land and the oath I have sworn. Inheritances are to be determined not by the custom of Parliament, but by the Common Law of England, which is the birthright of every Englishman. Custom ought to consist in usage, and I desire to see the precedent of such judgments. No precedent hath been alleged to warrant the determining inheritances originally *per legem Parliamenti*. If inheritances were determinable by the Lords without their having jurisdiction, they would have uncontrollable power, and *res est misera, ubi jus est vagum*." The judgment of the House of Lords was disregarded, and Holt, being summoned before a Committee of Privileges to answer for his contempt, rebuked his interrogators with dignity: "I acknowledge the thing. I gave the judgment, and I gave it according to my conscience. We are trusted with the law; we are to be protected and not

arraigned; we are not to give the reasons for our judgment in this fashion, and therefore I desire to be excused giving any."

Holt was also brought into collision with the House of Commons, and did not shrink from the conflict, being convinced that he was fighting for judicial independence. The bailiffs of Aylesbury had made a corrupt return at a parliamentary election, and an elector, whose vote had been improperly rejected, brought an action against the returning officers. It was urged that the action infringed upon the rights of the House of Commons, and this view was taken by the three puisne judges of the Queen's Bench. Holt differed.

Holt, C. J.: My brother Gould thinks no action will lie against the defendant, because, as he says, he is a judge; my brother Powys indeed says he is no judge, but *quasi* a judge; while my brother Powell thinks that the defendant is neither a judge, nor anything like a judge, but only an officer to execute the precept. . . . For slanderous words, though a man does not lose a penny by the speaking of them, yet he shall have an action, because the right to his fair fame is injured. So if a man receives a slight cuff on the ear, though it cost him nothing—no, not so much as a little diachylon—yet he shall have his action, for it is a personal injury. It is no objection to say this leads to multiplicity of actions; for if men will multiply injuries, actions must be multiplied too. Every man injured ought to have his recompense. But, says my brother Powys, we cannot judge of this

matter, because it is a parliamentary thing. Oh, by all means be very tender of that. But this matter never can come in question in Parliament, and there the plaintiff could receive no compensation for the wrong he has suffered.

Holt was in a minority, but the House of Lords having reversed the decision of the Queen's Bench, the case was followed by a cloud of actions brought by electors against returning officers. The plaintiffs in these actions were committed to Newgate by the Commons, and, having sued out writs of *habeas corpus*, were duly brought up in the Queen's Bench. Eleven judges held that they could not inquire into the merits of the imprisonment, but Holt, who was doubtless constitutionally wrong, said: "This is not such an imprisonment as the freemen of England ought to submit to. The prisoners have done that which was legal, according to the highest tribunal in the country, and which the House of Commons alone could not make illegal. Both Houses jointly cannot alter the law so as to affect the liberty or property of the subject; for this purpose the Queen must join. The necessity for the concurrence of the three branches of the legislature constitutes the excellence of our constitution. . . . The privileges of the House of Commons are well known, and are founded upon the law of the land, and are nothing but the law."

The speech which Lord Thurlow made, when he was slightingly spoken of in the House of Lords by the Duke of Grafton, is perhaps rather an instance of

personal than judicial independence; but it is not the less pointed on that account. Mr. Butler, in his "Reminiscences," says that the Duke had reproached Lord Thurlow with his plebeian extraction and his recent admission to the peerage. Thereupon Thurlow rose from the Woolsack, and advanced slowly to the place from which the Chancellor generally addresses the House; then, "fixing on the Duke the look of Jove when he grasped the thunder, 'I am amazed,' said he, in a loud tone of voice, 'I am amazed at his Grace's speech. The noble Duke cannot look before him, behind him, or on either side of him without seeing some noble peer who owes his seat in this House to successful exertions in the profession to which I belong. Does he not feel that it is as honourable to owe it to these as to being the accident of an accident? To all these noble Lords the language of the noble Duke is as applicable and as insulting as to myself. But I do not fear to meet it single and alone. No one venerates the peerage more than I do; but, my Lords, I must say that the peerage solicited me, not I the peerage. Nay, more; I can say, and will say, that as a peer of Parliament, as Speaker of this right honourable House, as Keeper of the Great Seal, as Guardian of his Majesty's Conscience, as Lord High Chancellor of England, nay, even in that character alone in which the noble Duke would think it an affront to be considered—as a man—I am at this moment as respectable—I beg leave to add, I am at this moment as respected—as the proudest peer I now look down

upon.'" This speech invested him in public opinion with a character for high independence and honour; and, although he was always on the reactionary side of politics, made him immensely popular in the country.

He spoke with equal independence when Lord Grenville, answering a speech made by the Duke of Clarence against the abolition of the slave trade, said that "between him and his Royal Highness there could be no personal debate, because between them there was no equality." Against this Lord Thurlow loudly protested, saying, "I am one of the lowest in point of rank. I contend not for superiority of talent or for any pretension whatever above any of your Lordships. But, my Lords, I claim to be exactly equal, not only to the illustrious personage who has just spoken, but to the Prince of Wales himself, if he were present in this House as a Peer of Parliament. I know of no difference between Peers of Parliament, considered in their parliamentary character, and I maintain that the lowest in point of precedence, while we are debating here, is equal to the highest. If rank or talent created an inequality in our right to speak in this House, the illustrious Prince who has lately addressed you would have a far higher right to be heard than I can pretend to; but in speaking my sentiments to your Lordships, I claim for my humble self a perfect equality with every Prince of the blood, and with those of the highest intellectual position in this assembly."

Added to the look of Jove, mentioned by Butler, Thurlow had an appearance of ineffable wisdom,

which made men say of him that he was the converse of Sir Nicholas Bacon—a much greater fool than he looked. Pitt used to say that he looked wiser than any man could possibly be, and that his exaggerated appearance of wisdom proved his dishonesty.

CHAPTER IV.

JUDICATURE.

The Magistrate—Jeffreys, Holt, Bacon, Thurlow, Lord Mansfield —Hanging Judges.

THERE seems to be some distinction between the faculties which go to make a good civil judge and those which produce a good magistrate. At all events, it has been found that judges whose conduct of criminal cases was perverted, if not infamous, were yet just and distinguished in their dealing with matters of civil dispute. In the administration of criminal matters by the English Bench may be found a great deal of misdirected wit and ability, which might have been more usefully employed in civil tribunals. Jeffreys gave the most conspicuous example of this abuse of judicial power. Of all the unscrupulous and corrupt judges who have sat on the English Bench, he was by far the ablest and the wittiest. His judgments, delivered while he was Chancellor, showed that he possessed the true judicial instinct for dealing with matters involving civil jus-

tice; and even when he misconducted himself most grossly as a criminal judge, a vein of strong humour ran through his brutal invectives. Posterity is for the most part so shocked by his cruel perversion of justice that it has scarcely patience to give him credit for wit; but a few instances of the racy cleverness of this disgrace to the English Bench may serve to set off the lustre of the high-minded men who have atoned for his pollution of the office of Chief Justice. Referring to the arbitrary tribunals over which Jeffreys and his fellows presided, "Why," said Erskine, in his speech for the Dean of St. Asaph—"why did our ancestors insist on their abolition? Was it that the question of libel should be determined only by the judges at Westminster? In the present time such a reform might be consistent with reason, because the judges are now honourable, independent, and sagacious men, but in those days they were often wretches—*libels upon all judicature;* and instead of admiring the wisdom of our ancestors, if that had been their policy, I should have held them up as lunatics to the scoff of posterity. Since in the times when those unconstitutional tribunals were supplanted, the courts of Westminster Hall were filled with men who were equally the tools of power with those in the Star Chamber; and the whole policy of the change consisted in the principle which was then never disputed—viz., that the judges at Westminster, in criminal cases, were but a part of the court, and could only administer justice through the medium of a jury." The same advocate, in Frost's case, declaiming

against the spirit of inquisition, said that it "began and ended with the Star Chamber. The venerable law of England never knew it; her noble, dignified, and humane policy soars above the little irregularities of our lives, and disdains to enter our closets without a warrant founded upon complaint. Constructed by man to regulate human infirmities, and not by God to guard the purity of angels, it leaves to us our thoughts, our opinions, and our conversations, and punishes only overt acts of contempt and disobedience to her authority. It did not therefore dog men into taverns and coffee-houses, nor lurk for them at corners, nor watch for them in their domestic enjoyments.

"This is not the specious phrase of an advocate for his client; it is not even my exposition of our constitution, but it is the phrase and letter of the law itself. In the most critical conjunctures of our history, when Government was legislating for its own existence and continuance, it never overstepped this wise moderation. To give stability to establishments, it occasionally bridled opinion concerning them, but its punishments, though sanguinary, *laid no snares for thoughtless life, and took no man by surprise.*"

In Erskine's time it was, as he said, the humane theory of the English law that the judge ought to be *counsel for the prisoner*. Bacon, who was dethroned for corruption, who contrived the prosecution of Peacham, and who cross-examined him during and between torture, saw with his bright instinct the true demeanour of a just criminal judge. The spirit which he indicated was not seriously cultivated by the

English judges until the nineteenth century, and even now its principle is sometimes in danger of being obscured. "Judges must beware," said he, "of hard constructions and strained inferences; for there is no worse torture than the torture of laws. Specially in cases of laws penal they ought to have care that that which was meant for terror be not turned into rigour. Therefore, let penal laws, if they have been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution. . . . In cases of life and death, judges ought (as far as the law permitteth) in justice to remember mercy; and to cast a severe eye upon the example, but a merciful eye upon the person."

If Bacon himself was forgetful of these words, Jeffreys made a point of casting a merciful eye upon neither the person nor the example: to be tried by him was to be convicted. When Richard Baxter was arraigned before him for a seditious libel, an application for a postponement was rudely refused. "We have had," said Jeffreys, "to do with other sort of persons, but now we have a saint to deal with; and I know how to deal with saints as well as sinners. Yonder stands Oates, in the pillory (as he actually did at that very time in the New Palace Yard), and he says he suffers for the truth, and so says Baxter; but if Baxter did but stand on the other side of the pillory with him, I would say that two of the greatest rogues and rascals in the kingdom stood there." After this impartial address the trial proceeded, and when Baxter's counsel had been in succession silenced by

the judge, the prisoner himself essayed to speak; but Jeffreys cut him short with this extraordinary speech: "Richard, Richard, dost thou think we will hear thee poison the court? Richard, thou art an old fellow, an old knave; thou hast written books enough to load a cart; every one is as full of sedition (I might say treason) as an egg is full of meat; hadst thou been whipt out of thy writing forty years ago, it had been happy. Thou pretendest to be a preacher of the Gospel of peace, and thou hast one foot in the grave. It is time for thee to begin to think what account thou intendest to give. Leave thee to thyself, and I see thou wilt go on as thou hast begun; but, by the grace of God, I'll look after thee. I know thou hast a mighty party, and I see a great many of the brotherhood in corners, waiting to see what will become of their mighty Don, and a doctor of the party (looking at Dr. Bates) at your elbow; but, by the grace of Almighty God, I will crush you all." It is needless to say that Baxter, although a man of great piety, and entirely innocent of the charge brought against him, was convicted, and fined £500. This judge surpassed himself in his bloody campaign in the West of England. Anxious to conclude a really formidable task, he announced that those who would plead guilty should find him a merciful judge; but "that those who put themselves on their trials (which the law mercifully gave them all, in strictness, a right to do), if found guilty, would have very little time to live; and therefore, that such as were conscious they had no defence had better spare him the trouble of trying

them." Accordingly, the Constable of Chardstock, having made a spirited defence, was ordered to be hanged first, Jeffreys proclaiming "that if any with a knowledge of the law came in his way, he should take care to prefer them." When he passed into Somerset, a certain Hucher, who had been found guilty of joining the Duke of Monmouth, pleaded in extenuation that he had in some way assisted the King's Generals; but this plea did not avail him, for his judge exclaimed, "You deserve a double death: one for rebelling against your sovereign, and the other for betraying your friends." In the same county, the Major who commanded his body-guard told him that two men of the name of Spokes having been convicted, the one who was ordered for execution had made his escape, and prayed that the man left in prison might be pardoned. The request was met with a point-blank refusal, the judge adding, "His family owe a life; he shall die for his namesake." So severe an eye did he cast upon the example, and so little did he in justice remember mercy. He wound up his campaign at Bristol, where there were very few prisoners connected with the Duke of Monmouth's rising, but where the Corporation had been indulging in sundry abuses. Amongst other things, the aldermen had been in the habit of selling, for their own benefit, prisoners charged with felony, and transporting them into slavery at Barbadoes. The charge of the Chief Justice to the grand jury is perhaps the most extraordinary production of the kind on record, but there is a dash of impudent yet amusing irony about it.

After commending the merciful rule of King James, he turned angrily upon the Duke of Monmouth: "On the other hand, up starts a puppet prince who seduces the mobile into rebellion, into which they are easily bewitched; for I say rebellion is like the sin of witchcraft. This man, who had as little title to the crown as the least of you (for I hope you are all legitimate), being overtaken by justice, and by the goodness of his prince brought to the scaffold, has the confidence (Good God! that men should be so impudent!) to say that God Almighty did know with what joyfulness he did die (a traitor!). Great God of heaven and earth! what reason have men to rebel? But, as I told you, rebellion is like the sin of witchcraft. *Fear God and honour the King* is rejected, for no other reason, as I can find, but that it is written in St. Peter." Then addressing himself to the proceedings of the Bristol aldermen, he continued: "Good God! where am I?—in Bristol? This city, it seems, claims the privilege of hanging and drawing among themselves. I find you have more need of a special commission once a month at least. The very magistrates, that should be the ministers of justice, fall out with one another to that degree they will scarcely dine together. . . . I am ashamed of these things, but by God's grace I will mend them; for, as I have told you, I have brought a brush in my pocket, and I shall be sure to rub the dirt, wherever it is, or on whomsoever it sticks."

To turn from this able but infamous judge to some of his successors is like coming out of Cimmerian

darkness into light. Chief Justice Holt not only understood the maxim of Lord Bacon, but carried it into practice. Shortly after he became Chief Justice he presided at the trial of Lord Reston for high treason. Though the accused had been concerned in a most dangerous conspiracy, Holt treated him with a merciful consideration which none of his immediate predecessors had observed. Even when the prisoner repeatedly interrupted his summing-up, he merely said, "Interrupt me as much as you please, if you think I do not observe right; I assure you I will do you no wrong willingly." Under his ruling hand the principles of justice were firmly restored. When Harrison was tried before him for the murder of Dr. Clench, a witness named Bishop was called to discredit the character of the prisoner; but the following dialogue shows that Holt would permit no such injustice:—

Bishop: About three years ago the prisoner came to my master's shop to cheapen some linen, and when——

L. C. J.: Hold! What are you doing now? Are you going to arraign his whole life? Away! away! That ought not to be: that is nothing to the matter.

The ninth resolution of the judges upon the case of the regicides, who were tried in 1660, is as follows:—"That when the prisoners come to the bar to be tried, their irons ought to be taken off, so that they be not in any torture while they make their defence, be their crime never so great." But under the fostering care of Jeffreys the habit of trying prisoners in

irons seems to have been resumed; for when Cranburne was tried for high treason in 1696, he was brought to the bar in irons. Holt at once called out, "Look you, keeper, you should take off the prisoners' irons when they are at the bar, for they should stand at their ease when they are tried." And when Vaughan was tried before the same judge for treason on the high seas, there was a similar scene.

Vaughan: My Lord, my irons are very uneasy to me; I desire they may be taken off.

L. C. J. Holt: Ay, ay, take them off.

This indulgence, however, was afterwards confined to the technical period of trial. Perhaps some merciful judge of the future will permit unconvicted prisoners to sit down while they are being tried.

Lord Bacon's practical ideal of a good criminal judge may be gathered from his criticism of Sir Edward Coke's demeanour. In 1618 the Earl of Suffolk and his wife were prosecuted in the Star Chamber on a charge of trafficking with the public money. They were convicted, and fined £30,000, a sentence of which Bacon complained to the King, saying that "Coke on this occasion had done his part excellently, but pursued his own constant course—*activity in detecting the offence, and moderation in punishing the offender.*" For his own part, he once said to his master, "The evidence went well, and I will not say I sometimes helped it, so far as was fit for a judge." It is not difficult to understand what that meant. If we take the trial of Warren Hastings, we shall find a Chancellor who, in place of helping the

evidence, maintained the principles of the Common Law as against the precedents of Parliament. At the outset, Lord Thurlow, addressing the accused, told him that whatever he might require for his defence would be his—time, witnesses, "and all things else you may require. This is not granted you as any indulgence; it is entirely your due; it is the privilege which every British subject has a right to claim, and which may be claimed by every one who is brought before this high tribunal." Again, after the conclusion of Burke's opening speech, a question arose as to the separation or combination of the various charges, when the Chancellor spoke as follows:—"With respect to the usage of Parliament, of which we have been told so much, as contradistinguished from the Common Law, I utterly disclaim all knowledge of it. It has no existence. In times of barbarism, indeed, when to impeach a man was to ruin him by the strong hand of power, the usage of Parliament was quoted in order to justify the most arbitrary proceedings. In these enlightened days I hope that no man will be tried but by the law of the land, which is admirably calculated to protect innocence and to punish guilt. The trial of Lord Strafford was from beginning to end marked by violence and injustice. A licentious and unprincipled fellow, Pym, attacked that noble Lord with all the virulence and malignity of faction. The real crime of that great statesman was that he had quitted his party: as if it were not meritorious to serve the State instead of a faction; as if it were a crime to quit a gang of highwaymen. The

Commons may impeach, but your Lordships try the cause, and the same rules of procedure and of evidence which obtain in the courts below I am sure will be rigidly followed by your Lordships."

When Lord Mansfield was Solicitor-General, an absurd story got abroad to the effect that when a boy he had drunk treasonable healths to the King over the water. So much clamour was raised on the subject that at last an inquiry took place before the Privy Council, and in the course of his defence Mr. Murray thus reflected upon State prosecutions: "I have not been able to learn any objection to my public conduct except that, in prosecuting the rebel Lords, I did not load them with reproachful epithets; as if epithets would have added to their guilt. I never considered that such language would be agreeable to my royal master; and if I had been counsel for the Crown against Sir Walter Raleigh, and that unfortunate man had been as clearly guilty of high treason as the rebel Lords, I would not have made Sir Edward Coke's speech against him to gain all Sir Edward Coke's estate and all his reputation." But a lurking impression remained for a long time to the effect that, even with the judge who tried it, a state prosecution was a mere party proceeding. In 1810, Mr. Perry, the proprietor of the *Morning Chronicle*, was tried on a criminal information for a seditious libel. The trial took place before Lord Ellenborough, and the accused was acquitted. As soon as the verdict was given, the Attorney-General, turning round to Lord Campbell, who was then a

junior in stuff, said, "We shall never get another verdict for the Crown while the Chief Justice is in opposition."

Until quite recently it was generally thought that a good effect was produced by the retention of severe punishments for trivial offences; and judges went through the form of sentencing men to death for stealing a pair of boots, although the sentence was not seriously meant to be carried out. It is said that a woman whom Lord Kenyon had sentenced to death for stealing a petticoat, on hearing her doom, fell down as if dead. The Chief Justice was much disconcerted, and repeatedly called out to the attendants, "Can't you tell her that I don't mean to hang her?" But real "hanging" judges are not so much of the past as might be supposed. Mr. Justice Buller is said always to have "hung" for sheep-stealing; and Baron Heath used to hang on principle in all capital cases, believing that it was impossible to regenerate felons, and that hanging was necessary for the protection of society. On one occasion, at the Gloucester assizes, having heard from a witness that he came from Bitton, he rejoined, "You do seem to be of the Bitton breed, but I thought I had hanged the whole of that parish long ago." The gross extravagance of judges of the "hanging" sort is well illustrated by a story which was told in the House of Commons. "Not a great many years ago, on the Norfolk circuit, a larceny was committed by two men in a poultry-yard, but only one of them was apprehended; the other, having escaped to a distant part of the country,

had eluded the pursuit. At the next assizes the apprehended thief was tried and convicted; but Lord Loughborough, before whom he was tried, thinking the offence a very slight one, sentenced him to only a few months' imprisonment. The news of this sentence having reached the accomplice in his retreat, he immediately returned, and surrendered himself to take his trial at the next assizes. The next assizes came, but, unfortunately for the prisoner, a different judge presided; and, still more unfortunately, Mr. Justice Gould, who happened to be the judge, though of a very mild and indulgent disposition, had observed, or thought he had observed, that men who set out with stealing fowls generally end by committing the most atrocious crimes. Building a sort of system on this observation, he had made it a rule to punish this offence with peculiar severity, and he accordingly, to the astonishment of the unhappy man, sentenced him to be transported to Botany Bay." The hanging judges doubtless kept within the strict letter and principles of the law; and it used to be said of Buller that, although no guilty man would choose to be tried by him, an innocent prisoner would greatly prefer him for a judge. Where a discretion is given to judges, sentences may and must differ, but the English judges of the present day have fully adopted the beneficent principle of casting a merciful eye upon the person.

CHAPTER V.

LEGAL AND JUDICIAL WISDOM.

Reporters—Lawyers in Parliament—Judicial Instinct.

In former days judges and politicians were very much at the mercy of reporters, who had great power for good or evil. Coke was his own reporter, but as a reward for his industry he was ordered to be suspended from his office and to employ his leisure in correcting the errors which were said to exist in his reports. Holt used to complain that his reporters would "make posterity think ill of his understanding and that of his brethren on the Bench." On the argument of a demurrer before him, one of the exceptions taken by a defendant to an indictment had been "stirred twice before in Hilary Term, and seemed to stick much with the court, and they ordered precedents to be searched." A case was then produced which did not satisfy the judges; for "*Holt, C. J.*, said that by his consent they would not be so nice again, and that there was not a case in the law like that. . . . *Powell* said that *West's* 'Precedents' was a pretty judicious book; but *Holt* said there were many bad precedents in it." The judges were still sensitive upon the subject in Lord Mansfield's time; for that judge, when any one attempted to quote Serjeant Barnardiston's reports, "absolutely forbade it. It would only be misleading students to put them upon reading it. It

was marvellous to those who knew the Serjeant that he should so often as he did stumble upon what is right." His feelings on the subject of reporting are very happily expressed in the farewell speech which he addressed to the Treasurer of Lincoln's Inn on his appointment to be Chief Justice of the King's Bench. He said: "If I have had in any measure success in my profession, it is owing to the great man (Lord Hardwicke) who has presided in our highest courts of judicature the whole time I attended the Bar. It was impossible to attend him, to sit under him every day, without catching some beams from his light. The disciples of Socrates, whom I will take the liberty to call the great lawyer of antiquity, since the first principles of law are derived from his philosophy, owe their reputation to their having been the reporters of the sayings of their master. If we can arrogate nothing to ourselves, we can boast the school we were brought up in; the scholar may glory in his master, and we may challenge past ages to show us his equal."

Lord Loughborough used to inveigh hotly against shorthand reporters. "Of all people," he said, "shorthand writers are the farthest from correctness; there are no men's words they ever hear that again return. They are in general ignorant, as acting mechanically; by not considering the antecedent, and catching the sound and not the sense, they pervert the meaning of the speaker, and make him appear as ignorant as themselves." Things, however, are very different now, and, indeed, there is another side of the subject. Lord Loughborough himself, when he was

asked if he had really made a speech which was ascribed to him, said: "To be sure there are in that report a few things which I did say, but many things which I am glad I did not say, and some things which I wish I could have said." Lord Justice Knight Bruce used to say that the newspaper reports of his judgments read like fairy tales, and they were probably not amiss. But we learn from Lord Campbell that, although a slovenly reporter can make posterity think ill of a judge, a good reporter may make a reputation for him. He himself claims to have contributed greatly to Lord Ellenborough's judicial fame by excluding from his reports a vast mass of cases which were contrary both to the principles and precedents of the Common Law. In truth, judges forget that it is perhaps easier, and certainly more pleasant, to say good things than to repeat them; and possibly we ought to be more grateful than we are to those who have preserved for us the efforts of judicial and oratorical wisdom.

The members of the English Bench and Bar have made large contributions to the good and greatness of this country, but it is unfortunately only possible to allude to them here in a very limited manner. Their contributions to literature may be passed over; but it would be very instructive to follow the wit and wisdom of those great lawyers who have taken no small part in building up the fabric, as we now see it, of society, commerce, and the constitution. It is not, however, possible in this volume to pursue the effect of legal wisdom upon the great commercial and constitu-

tional questions which vexed the minds of our ancestors. Nor is it open to us to follow distinguished advocates into the House of Commons, or great judges into their struggles and intrigues in the Upper Chamber. To a great extent, the personalities of the most distinguished of English advocates and judges are almost inseparable from their parliamentary life. Even if we reject such parts of their careers as relate to politics pure and simple, there is still a vast field of matter in which justice and public policy run side by side. For example, Parliament and the Law Courts were busy at the same time with the rights of juries in cases of libel, with the marriage laws, questions involving the principle of religious toleration, and the mitigation of the Criminal Law. Sir Thomas More was returned to Parliament, "for many had taken notice of his sufficiency;" and he is said to have been the first member of the House of Commons who gained celebrity by public speaking. Bacon, although his relative, Sir Robert Cecil, said that he was "a speculative man, indulging himself in philosophical reveries, and calculated more to perplex than to promote public business," resolved in his own mind to take "all knowledge" for his province; and we know that he had not been long in the House of Commons before, when he addressed it, "the fear of every man was that he would make an end." The time came when lawyers took a decided lead in politics. When Thurlow and Wedderburn were law officers of the Crown, they gained a position which is thus described by Gibbon, an authority personally

familiar with the House of Commons at the time:—"The cause of Government was ably vindicated by Lord North, a statesman of spotless integrity, a consummate master of debate, who could wield with equal dexterity the arms of reason and of ridicule. He was seated on the Treasury Bench between his Attorney and Solicitor-General, *the two pillars of the law and state, magis pares quam similes;* and the minister might indulge in a short slumber, whilst he was upholden on either hand by the majestic sense of Thurlow, and the skilful eloquence of Wedderburn."

In every great question which has agitated Parliament, lawyers and judges have acted a part; but from time immemorial there has been a prejudice against them. It is usual to say that a lawyer speaks "from his brief," or with an eye to office and promotion. When Sir John Owen made his first appearance in the House of Commons, he was rapturously cheered, most people being under the impression that he was a country gentleman of a very superior type; but when it was discovered that he was a lawyer, the men who had cheered his first speech combined to cough him down. The accession of Lord Thurlow to the Woolsack at first caused a great commotion in the Upper House. He was perpetually bullying and opposing every measure of improvement introduced into the House, and used to complain that it was a great "hardship that his manner—that of a plain man, who studied nothing but to convey his sentiments clearly and intelligibly—should be imputed to him as if arising from a habit of indiscriminate

opposition or intentional rudeness." On one occasion during his tenure of the Woolsack, a profusion of law Lords having addressed the House, Lord Fortescue said that "the dignity of the House had been degraded, lowered, and tarnished by a multitude of lawyers; that it was no longer a house of peers, but a mere Court of Law, where all the solid and honourable principles of truth and justice were shamefully sacrificed to the low pettifogging chicanery and quibbles of Westminster Hall. That once venerable and august assembly now resembled a meeting of attorneys in a Cornish court acting as barristers; and the learned Lord on the Woolsack seemed to be fraught with nothing but contradictions and legal subtleties and distinctions, and all that." Such criticisms proceed to a great extent from the consciousness of lay members that they are at a disadvantage with men who are trained to discussion, and, it may be, practised in chopping logic. But the House of Commons has always appreciated the feelings of the genuine lawyer. In 1819, a question of privilege having arisen, and Mr. Charles Wynn, the "father" of the House, having expressed an opinion upon it, Brougham, who entertained a different view, rose and said: "I am particularly grieved by the sentiments expressed by my right honourable and learned friend, the member for Montgomeryshire—a man learned beyond all others in the history of the assembly whose privileges I am endeavouring to support; skilled beyond all men, deeper than all the children of men in the knowledge of the voluminous

records of parliamentary precedents; a man who is even supposed by most people to know the whole of the journals of the House by heart; who devotes to their study the light of day and the midnight oil; whose attention to everything connected with Parliament is so rigid that many persons suppose he really comes down to the House every morning at ten o'clock, the hour at which the House ought to assemble, according to the strict letter of the adjournment; in short, a man whose devotion in this respect can only be equalled by that of a learned ancestor of his (Speaker Williams), who, having fainted from excessive toil and fatigue, a smelling-bottle was called for, when one who knew much better the remedy adapted to the case exclaimed, 'For God's sake bring him an old black-letter Act of Parliament, and let him smell at that.' I cannot help thinking that in like manner, if my right honourable and learned friend should ever be attacked in a similar way, the mere smelling of a volume of the journals could not fail instantly to revive him."

The following remarks of Lord Brougham upon his Whig friends form a powerful illustration of the retort which the lawyer can make upon such sarcasms as those of Lord Fortescue: "He abhorred the spirit of intrigue, which not rarely gave some inferior man, or some busy, meddling woman, probably unprincipled, a sway in the destiny of the party, fatal to its success, and all but fatal to its character; he held in utter ridicule the squeamishness, both as to persons and things, which emasculated so many of the genuine

regular Whigs; and no consideration of interest, no relations of friendship, no regard for party discipline, could prevail with him to pursue that course, so ruinous to the Whig Opposition, of half-and-half resistance to the Government, *marching to the attack with one eye turned to the Court and one askance to the country*, nor ever making war upon the Ministry without regarding the time when themselves might occupy the position now the object of assault. The patrician leaders of the party never could learn the difference between 1810 and 1780—still fancied they lived in times before the flood of the French Revolution, when the heads of a few great families could dispose of all matters according to their own good pleasure—and never could be made to understand how a feeble motion, prepared by a feeble speech, if made by an elderly Lord and seconded by a younger one, could fail to satisfy the country and shake the Ministry."

But to turn to judicial wisdom, and the instinct from which it springs, it may be said that men of ability and learning are not necessarily good judges. The judicial instinct, the power of *seeing* justice, is a kind of natural gift. The judge by nature never pauses to consider the side issues which often obscure the vision of more subtle minds. Able men who do not possess the instinct may arrive at just conclusions by means of rigid logic; but when they go wrong, they do so with great ingenuity. The following exquisite story of Sir Thomas More indicates the judicial instinct more forcibly than any definition:—

"It happened on a time that a beggar-woman's little dog, which she had lost, was presented for a jewel to Lady More, and she had kept it some se'nnight very carefully; but at last the beggar had notice where her dog was, and presently she came to complain to Sir Thomas, as he was sitting in his hall, that his lady withheld her dog from her. Presently my Lady was sent for, and the dog brought with her, which Sir Thomas, taking in his hands, caused his wife, because she was the worthier person, to stand at the upper end of the hall, and the beggar at the lower end, and, saying that he sat there to do every one justice, he bade each of them call the dog, which when they did, the dog went presently to the beggar, forsaking my Lady. When he saw this, he bade my Lady be contented, for it was none of hers; yet she, repining at the sentence of my Lord Chancellor, agreed with the beggar, and gave her a piece of gold which would well have bought three dogs; and so all parties were agreed, every one smiling to see his manner of inquiring out the truth."

Chief Justice Holt was strongly imbued with the judicial instinct. On more than one occasion he was called upon to deal with a crazed sect of religionists called the Prophets. Acting, as the Chief Justice often did in former times, as a magistrate, he had committed one John Atkins, belonging to the fraternity, to take his trial for seditious language. Thereupon one of the Prophets, by name Lacy, called at the house of the Chief Justice, in Bedford Row, when the following conversation took place:—

Servant: My Lord is unwell to-day, and cannot see company.

Lacy (in a very solemn tone): Acquaint your master that I must see him, for I bring a message to him from the Lord God. (Being admitted to the presence of the Chief Justice), I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou hast sent to prison.

Holt, C.J.: Thou art a false prophet and a lying knave. If the Lord God had sent thee, it would have been to the Attorney-General, for he knows that it belongeth not to the Chief Justice to grant a *nolle prosequi;* but I, as Chief Justice, can grant a warrant to commit thee to bear him company.

Lord Mansfield had a great contempt for purely technical arguments, and always disregarded them when he could. His ingenuity in this respect was sorely taxed by that eminent black-letter lawyer, Serjeant Hill. According to Lord Campbell, the Serjeant once objected to the reception in evidence of a document which purported to be an indenture; arguing that an indenture was a document the edges of which were irregular, *instar dentium*, and that the proof of an indenture and its counterpart depended upon the correspondence of the rough edges of the two documents. The edges of the deed which excited the suspicions of Serjeant Hill had been cut straight across. Lord Mansfield ordered the guilty document to be handed to him, and having looked along its edges with his right eye, disposed of the objection by

saying, "I am of opinion that this is not a straight mathematical line; therefore it is *instar dentium*, and comes within your own definition of an indenture. Let it be read in evidence."

In the eighteenth century men might be, and sometimes were, hanged for stealing in a dwelling-house to the value of forty shillings. Merciful judges were therefore anxious, if possible, to reduce the value of stolen goods below the capital limit. Lord Mansfield, in summing up the evidence in a case of this kind tried at the Old Bailey, told the jury to find that a gold trinket which had been stolen did not amount in value to forty shillings. This direction did not meet with the approval of the prosecuting jeweller, who cried out that the fashion alone had cost him double that sum. "God forbid," observed the Chief Justice, "that we should hang a man for fashion's sake."

Lord Campbell tells an amusing story illustrating the downright manner in which Thurlow made his way to justice. The Chancellor had the gift of a rectory, which Queen Charlotte solicited on behalf of a *protégé*. At the same time an earnest appeal was made to him by the curate of the parish that, in consideration of his large family, he might be continued under the new rector. The living was promised to the Queen's nominee, who presently called to express his thanks to the Chancellor, but absolutely refused to continue the curate in charge, saying that he had promised the place to a friend. This was too much for Thurlow, who broke out upon his visitor in these

words: "Sir, I cannot make this gentleman your curate, it is true; but I can make him the rector, and he shall have the living, as he cannot have the curacy." And he was as good as his word.

On the subject of litigation, or going to law in general, some remarks of keen judicial wisdom fell from Lord Justice Knight Bruce, in the case of *Danks v. Farley*. It would be indeed well if they were taken to heart by people who invoke the law courts for the settlement of paltry disputes. Danks and Farley had been intimate friends and neighbours for many years, but they quarrelled about the amount of a plumber's bill. Farley placed the value of his work at £96, while Danks accused his old friend of charging him £11 too much. In dealing with the case, the Lord Justice said: "So, and upon no great matter—upon a matter which, if they had not good sense enough to settle it for themselves, some respectable neighbour would probably, upon application, have adjusted for them in an hour—began (as I collect) the career of cost and heat and hatred, of reproach, scandal, and misery in which they are now engaged, of which neither this day, nor this year, nor perhaps another will, I fear, see the end, and which seems well to exemplify an old English saying, that the mother of mischief is no bigger than a midge's wing."

CHAPTER VI.

LEGAL AND JUDICIAL WISDOM.

Slavery — Torture — Witchcraft — Duelling — Oaths — Religious Toleration—Marriage—The Liberty of the Press—Cock-fighting —Cruelty to Animals.

In his speech for Mr. Bingham, Erskine said: "This cause involves an awful lesson—and more instructive lessons are taught in courts of justice than the Church is able to inculcate. *Morals come in the cold abstract from pulpits; but men smart under them practically when we lawyers are the preachers.*" In this chapter there are given a few examples which serve to show how the wisdom of lawyers has advanced social questions, and reproved immorality and injustice.

In 1637 one John Lilburne was, for contempt in refusing to answer interrogatories, imprisoned by order of the court until he should answer, and also whipped, pilloried, and fined. In 1640 he was released, and the judges of the Star Chamber who had sentenced him were impeached by the Long Parliament. To prove that they had violated the law, a case was quoted in which one Cartwright "brought a slave from Russia, and would scourge him, for which he was questioned; and it was resolved that *England was too pure an air for a slave to breathe in.*" But on the Restoration there was some backsliding from this principle; and the judges were placed in a very awkward position by

the fact that in Jamaica, Barbadoes, and other places, Englishmen had a legal property in negroes. On the other hand, when negroes were brought to this country, it was difficult to countenance the proprietary rights of their masters on any plausible ground. Thus, it was held that *trover* would lie for a negro boy; "for they are heathens, and therefore a man may have a property in them; and the court, without averment made, will take notice that they are heathens." This was not such a doctrine as the upright mind of Holt could stand; and accordingly, a certain Smith having brought an action for £20, the price of a negro sold by him to the defendant:—

Holt, C. J.: As soon as a negro comes into England he becomes free; one may be a villein in England, but not a slave.

Powell, J.: In a villein the owner has a property, but it is an inheritance; in a ward he has a property, but it is a chattel real; the law takes no notice of a negro.

"Then the Attorney-General coming in, said they were inheritances, and transferable by deed, and not without. *And nothing was done.*"

In the same court a man sued in trover for a variety of things, and amongst others an Æthiopian. A verdict was given for the plaintiff, and as to the negro £30. Judgment, however, was arrested, and an argument took place, in which the plaintiff's counsel urged that negroes were merchandise, like monkeys; while the defendant maintained that their owner had not an absolute property in them, because

he could not kill them like oxen. Holt said: "This action does not lie for a negro any more than for another man; for the Common Law takes no notice of negroes being different from other men. By the Common Law no man can have a property in another, but in special cases, as in a villein; but even in him not to kill him. There is no such thing as a slave by the law of England." Therefore judgment was given for the plaintiff for all but the negro. But in spite of such decisions a great delicacy was felt about interfering with what was an acknowledged property in the Indies; and it was not until Somersett's case, determined in 1771, that the law was finally and clearly laid down. In all the intermediate cases the court had induced the parties to come to a compromise. Somersett, being a negro, was brought by his master, a Mr. Steuart, from Jamaica, to attend and abide with him, and to be carried back to Jamaica with him as soon as his business in this country should be concluded. The slave, however, having doubtless heard of the maxim regarding the purity of the air of England, quitted his master's service, and the court was called upon to decide whether Mr. Steuart might seize, detain, and carry him back to Jamaica. Lord Mansfield, having failed in an attempt to make the parties come to a compromise, exclaimed: "If the parties will have judgment, *fiat justitia, ruat cœlum;* let justice be done whatever be the consequence. Fifty pounds a head may not be a high price; but then a loss will follow to the proprietors of slaves in the Indies of £700,000.

How would the law stand with respect to their settlement—their wages? How many actions for any slight coercion by the master? We cannot in any of these points direct the law; the law must rule us." He admitted that Sir Philip Yorke and Lord Talbot, when Attorney and Solicitor-General, had pledged themselves to the British planters for all the legal consequences of negroes coming to this country and being baptised; that Lord Hardwicke, sitting as Chancellor, had said that there was a mistaken notion that if a negro came over, or became a Christian, he was emancipated. But he concluded in these terms:—"The slave departed, and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognised by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, and can only be enforced in obedience to positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it sprang, are erased from the memory. It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say that this case is allowed or approved by the law of England. The black must be discharged."

Justice being thus finally vindicated, no one has since ventured to contend that slaves can breathe the air of England. Indeed, the law is jealous of the

personal liberty of all who visit or inhabit this country, and in particular of those who by their ignorance seem to be marked out by Nature as the objects of the cruelty and tyranny of other men. In 1810 a native woman of South Africa was exhibited in London under the name of the Hottentot Venus. The secretary of a society called the African Institution, imagining that she had been clandestinely inveigled from the Cape of Good Hope without the knowledge of the British Governor, "who extends his peculiar protection in nature of a guardian over the Hottentot nation under his government, by reason of their imbecile state," obtained a rule for her examination, on the ground that she had been brought to this country and exhibited against her will. The examination took place, and the rule was discharged on the Hottentot Venus informing the examiners that she came to England of her own accord, and under a contract to receive a proportion of the profits. Such is the protection which the law gives to black men and women who were once regarded as slaves by nature; and now friendly Zulus may roam the streets of London with as perfect freedom as the white man, and maintain their rights in Courts of Law and Police. This is what English lawyers have done without the assistance of legislation.

The legislature, however, was able to reach beyond the jurisdiction of the courts, and to extend the principles which they taught to distant parts of the globe. In this great work the lawyers were not idle. In 1788 a Bill was introduced, not for the abolition of

slavery in our colonies, not for the abolition of the slave-trade, but for mitigating the horrors of the "middle passage." Slavers were to be compelled to give their living cargo a little room. The Africans were, as a rule, "packed between decks on platforms, like books on shelves, and were thought to be perfectly at their ease if they had just room enough to turn." We are sorry to say that this reasonable measure was bitterly opposed by Lord Thurlow, who endeavoured, fortunately without success, to smother it with ridicule. As the Bill stood, it was, he said, nonsense He therefore concluded that some amendments would be proposed to connect the nonsense of one part of the Bill with the nonsense of the other. "It was evident the French had offered premiums to encourage the African trade, and that they had succeeded. The natural presumption therefore was that we ought to do the same. For his part he had no scruple to say that, if the five days' fit of philanthropy which had just sprung up, and which had slept for twenty years together, had continued to sleep one summer longer, it would have appeared to him rather more wise than thus to take up a subject piecemeal, which it had been publicly declared should not be agitated at all till the next session of Parliament. Perhaps by such imprudence the slaves might be taught of their own accord to proceed to an abolition of the trade." Speaking of the interests of the so-called African merchants, "One witness, he understood, had come to their Lordships' bar with a face of woe, his eyes full of tears, and his countenance fraught with

horror, and had said, 'My Lords, I am ruined if you pass this bill. I have risked £30,000 upon the trade this year. It is all I have been able to gain by my industry, and if I lose it, I must go to the hospital.'"

But the Bill was not the creature of a five days' fit of philanthropy. It represented the determination of English humanity. It was passed into law in spite of Lord Thurlow's jibes, and before four years had elapsed a series of resolutions were brought from the Commons into the House of Lords recommending the abolition of the slave-trade. Again the Lord Chancellor showed his partiality for the old state of things, arguing that the importation of slaves was necessary to the cultivation of the West Indies. The resolutions he regarded as "an attempt to legislate in this country for the regulation of the West India islands internally, which he stated to be perfectly new and unprecedented. As to the iniquity and atrocity which had been so largely imputed to the slave-trade, he could not imagine why those crimes had not been discovered by our ancestors, and were now to be so conspicuous in the year 1792." Seven years later a Bill came into the House of Lords for *limiting* the trade, and the debate on the order for going into Committee was closed by Thurlow, who replied to the Bishop of Rochester. The Bishop, having described the cotton petticoat worn by some of the negro women, had asked, "My Lords, is this the dress of savages? Is there not evidently a degree of elegance and neatness in it?" Lord Thurlow acknowledged himself unequal, "nor did he think it necessary, to

follow the right reverend prelate through the labyrinth of his learned disquisition. It would indeed be vain; for perhaps there was no text of Scripture to which some learned gownsman might not, by referring to Greek and Hebrew etymologies, give some other meaning than that in which it appeared to a plain man like himself. As little could he perceive the justness of that reasoning by which he went to prove the morality of the Africans by the women wearing petticoats. He could not see that in the best system of morality and the purest system of religion which ever appeared—the Christian religion—there was any prohibition against slavery like that which had been argued by the reverend prelate. The Bill was drawn up in a most clumsy manner, giving as the necessity for adopting it 'Whereas a factory has been erected on the coast of Africa;' but probably it meant the Sierra Leone Company. What other trade could they carry on? It was a miserable company, which never could flourish in a place which experience had proved to be incapable of yielding any productions of value. The Bill was altogether miserable and ridiculous. But the Society alleged that it would civilise the Africans; that was to say, they would send a missionary to preach in a barn at Sierra Leone to a set of negroes, who did not understand a single word of his language. He considered the Bill to be absurd, unjust, and such as ought not to be passed into a law." The Bill was thrown out by a narrow majority, and thus for a short time slavery flourished, protected by prejudice and ridicule.

Before long wiser and more humane counsels

came from the Woolsack. The crimes, "which had not been discovered by our ancestors," became so conspicuous, that no sooner did the Fox and Grenville Government come into power in 1806 than a Bill for the abolition of the slave trade was introduced. Thus did Lord Erskine, who occupied the Woolsack, support the Bill:—

"I was in the West Indies some years ago, in the service of my country, and the condition of the slaves there seemed to me to be comfortable; they were generally treated in the kind manner used by great families in England to their ancient domestics. Believing them to be happy and contented, I could not be hostile to a system which produced such results. I have since had reason to think that I was deceived by outward appearances, and that *without evil man can never be the property of man.* The horrors of a Guinea ship have been lately disclosed to me in the course of my profession. During the trial of a policy of insurance on a cargo of slaves, it appeared that having risen on the crew in hopes of liberty, and being fired upon, some of them were mortally wounded, some voluntarily jumped overboard—a prey to the sharks—while others who remained on board died from refusing to take food; and a British jury was called upon to say for which of these classes the underwriters were to make compensation to the slave-dealers. This country is the morning star which has enlightened Europe, and let us now set an example of humanity and justice which may be followed by all the nations of the earth." The Bill became law that very session.

Only one step remained to be taken by those who laboured to extend the principle of freedom, which the English courts had established, to all countries over which the British flag waved. The horrors of the middle passage were mitigated, the slave-trade itself was abolished, but the institution of slavery still existed in British colonies. In 1810 Brougham moved an address to the Crown on the subject of slavery, in a speech of remarkable force and brilliancy. Speaking of the trade which was still carried on in defiance of the law, he said :—

"Vessels were fitted out at Liverpool as if for innocent commerce with Africa. The goods peculiarly used in the slave-trade were carefully concealed, so as to elude the reach of the port officers. The platforms and bulkheads, which distinguished slave-ships, were not fitted and fixed until the vessel got to sea and cleared the Channel, when the carpenters set to work and adapted her for the reception of slaves. Lurking in some dark corner of the ship was almost always to be found a hoary slave-trader—an experienced captain, who, having been trained up in the slave business in his early years, now prowled about as a supercargo, helping the gang of man-stealers by his wiles both to escape detection and to push their iniquitous adventure. But a few months ago, in the very river which washed the walls of that House, not two miles from the spot where they now sat, persons, daring to call themselves English merchants, had been detected in the act of fitting out a vessel of great burthen for the purpose of tearing seven or eight hundred

wretched beings from Africa, and carrying them through the unspeakable horrors of the middle passage to endless bondage and misery in the sands and swamps of Brazil. At one port of this country six vessels had only just been fitted out by a similar course of base frauds for the same trade, or rather the same series of detestable crimes. Three years having elapsed since this abominable traffic had ceased to be sanctioned by the law of the land, he thanked God he might now indulge in expressing feelings which deference to that law might before have rendered it proper to suppress. Our indignation might now be hurled against those who still dare to trade in human flesh; not only practising the frauds of common smugglers, but committing crimes of the deepest dye. It was *not commerce but crime* which they were driving. Of commerce, that most honourable and useful pursuit, whose object is to humanise and pacify the world—so inseparably connected with freedom, and good-will, and fair dealing—he deemed too highly to endure that its name should, by a strange perversion, be prostituted to the use of men who lived by treachery, rapine, torture, and murder. When he said *murder* he spoke literally and advisedly. He meant to use no figurative phrase, and he knew he was guilty of no exaggeration. He was speaking of the worst form of that crime. For ordinary murders there might be some excuse. Revenge might have arisen from excess of feelings honourable in themselves. A murder of hatred, or cruelty, or mere bloodthirstiness could only be imputed to a deprivation

of reason. But here we have to do with cool, deliberate, mercenary murder; nay, worse than this —for the ruffians who go upon the highway, or the pirates who infest the seas, at least expose their persons, and by their courage throw a kind of false glare over their crimes. But these wretches dare not do this. They employ others as base, but less cowardly than themselves; they set on men to rob and kill, in whose spoils they are willing to share, though not in their dangers. Traders or merchants do they presume to call themselves?—and in cities like London and Liverpool, the very creations of honest trade? Give them their right name at length, and call them cowardly suborners of piracy and mercenary murder. Deprive these miscreants of the means of safe criminality, and society may be purified and avenged. Some of them will naturally go on the highway; others will betake themselves to open piracy, and we may see them hanging in chains along with other malefactors, as we descend the river Thames—a fit retribution for their crimes."

The lapse of fourteen years saw no change, and in 1824 the same impetuous orator declared that "we are sovereign alike over the white and the black; and though we may for a season, and out of regard for the interests of both, suffer men to hold property in their fellow-creatures, we never, for even an instant of time, forget that they are men and the fellow-subjects of their masters. . . . Yet a little delay; yet a little longer of this unbearable trifling with the commands of the parent State, and she will stretch

out her arm, in mercy, not in anger, to those deluded men themselves; exert at last her undeniable authority; vindicate the just rights, and restore the tarnished honour of the English name." It was not until 1833, when Lord Brougham was Chancellor, that the subject was seriously taken up. In that year the Slavery Abolition Bill was brought in, and whatever evil may have resulted from it, it must be admitted to have been a great measure; for it finally completed the doctrine of the English Common Law, that one man cannot be the slave of another.

In discussing the clauses of the Bill, the Chancellor adverted at some length to the decision of a learned judge, which condemned a slave who had been in England—and who consequently became free—to slavery again on returning to Jamaica, and he spoke of the decision as one which gave great dissatisfaction, not only to the public but to the Bar.

The Lord Chancellor: Such a man, being a natural born subject of his Majesty, would have as good a right to sit in the other house of Parliament, or in this House, as the noble duke opposite (the Duke of Wellington), who is illustrious by his actions, or the illustrious duke near me, who is illustrious by the courtesy of this House.

Duke of Cumberland (rising to order): I have not said one word to call for such an attack.

The Lord Chancellor: The illustrious duke is out of order, and in calling me to order is most disorderly. The illustrious duke said that he had not alluded to me, but I am alluding to the illustrious duke. I have

a right to address any one of your Lordships. I exercised the right of addressing the members of the other House for twenty years, and, please God, I shall continue to exercise that right as regards your Lordships. I contend that the negro, if a free subject of his Majesty, has a right to sit in Parliament—as good a right to sit there as any one of the noble Lords opposite; as good a right as any one of the right reverend bishops, or as the illustrious duke, or as the other noble duke who is illustrious by his conduct, to sit in this House, if it pleased his Majesty to confer on him the honours of the peerage; and as much right to sit in the other House as any man there. Every one acquainted with the history of Parliament knows that this is a circumstance likely to be tried. A noble Lord, in the days of Schedule A, who was responsible to nobody but himself, talked of sending his black servant into Parliament. Whether it was with the intention of trying the right of the negroes, or of bringing into Parliament men of that colour, I do not know; but certainly such an intention was professed. How does that bear on the argument? Why, it shows that the fact of the man having been born in England is a proof that he was fit for freedom.

The attempt of which Brougham spoke never has been, and never was likely to be tried. No negro will ever occupy a seat in either Chamber of the British Parliament, but it is true that there is no constitutional bar to their admission. The Lord High Chancellor was in a satirical humour when he

made the above speech; nevertheless, the Bill which he supported became law, and slavery was abolished in British possessions at an expense of £20,000,000, paid in compensation to the slave-owners.

We are indebted to English judges for laying down that torture is not permitted by the law of England. In 1628 some of the Court party were anxious to put to the rack John Felton, who assassinated the Duke of Buckingham. He was brought many times before the Council, but, admitting his own guilt, refused to implicate any one else. He was told by the Bishop of London that, if he would not confess he must go to the rack. Felton replied that, if it must be so, he could not tell whom he might name in the extremity of torture; and if what he might say then must go for truth, he could not tell whether his Lordship, the Bishop of London, or which of their Lordships he might name; for torture might draw unexpected things from him. After this he was asked no more questions, but sent back to prison; and the King (Charles I.), being at the Council, suggested that the opinions of the judges should be asked. The question was therefore put to them, through Sir Thomas Richardson, whether Felton might not be racked, and whether there were any law against it. "For," said the King, "if it may be done by law, I will not use my prerogative in this point." Thereupon, the judges, having met and consulted at Serjeants' Inn, "agreed in one, that he ought not by the law to be tortured by the rack; for no such punishment is known or allowed by our law."

In the trial of Elizabeth Cellier, in 1680, for publishing a libel, we have a very flat statement from Mr. Baron Weston. The prisoner had written a book in which she alleged that she had heard the groans of men being tortured in Newgate, and that one Corral had told her, when he came out of prison, that he had been "squeezed and hasped into a thing like a trough in a dungeon under ground." On this subject the Baron observed: "The laws of the land do not admit a torture, and since Queen Elizabeth's time there hath been nothing of that kind ever done. The truth is, indeed, in the twentieth year of her reign, Campion was just stretched upon the rack, but yet not so but that he could walk; but when she was told it was against the law of the land to have any of her subjects racked, yet it was never done after to any one—neither in her reign, who reigned twenty-five years after; nor in King James's reign, who reigned twenty-two years after; nor in King Charles the First's reign, who reigned twenty-four years after. And God in Heaven knows that there hath been no such thing offered in this King's (Charles II.) reign; for we have lived under as lawful and merciful a government, and have had as little bloodshed and sanguinary executions as any nation under heaven." The worthy Baron was either ignorant of, or purposely concealed, the real facts. Torture was sanctioned by the laws of other countries. In Scotland it existed under the protection of the law until the reign of William III.; and at the time when Baron Weston spoke, the boots and thummikins, the caspicaws and milliwinks,

were often enough used in that part of the kingdom. It was quite true that it was against the law of England; but English lawyers had sanctioned and recommended it. To a man like Bacon law was sometimes a mere excuse. Mr. Baron Weston had, at all events, forgotten Peacham's case. Peacham being committed to the Tower upon a ridiculous charge of high treason, Bacon wrote to King James: "I hold it fit that myself and my fellows go to the Tower, and so I purpose to examine him upon these points." A list of twelve compact interrogatories was drawn up, and we know that they were duly put to the prisoner; for the following memorandum, signed by Bacon and many of his "fellows," was attached to them:—

"Upon these interrogatories Peacham this day was examined before torture, in torture, between torture, and after torture; notwithstanding, nothing could be drawn from him, he still persisting in his obstinate and insensible denials and former answers."

The Duke of Exeter had the infamy of bringing the rack or brake sanctioned by the Civil Law into the Tower, in furtherance of his design to introduce the Civil Law in place of the English Common Law; and hence the rack was called the Duke of Exeter's daughter. But at the time at which Bacon was superintending the torture of Peacham, Sir Edward Coke, the Chief Justice, was writing in a very different strain:—"Sir John Fortescue, Chief Justice of England, wrote his book in commendation of the laws of England, and therein preferreth the same for the Government of this country before the Civil Laws; and particularly

that all tortures and torments of parties accused were directly against the Common Laws of England, and showed the inconvenience thereof by fearful example, to whom I refer you, being worthy of your reading. So as there is no law to warrant tortures in this land, nor can they be justified by any prescription being brought in.

"And the poet, in describing the iniquity of Radamanthus, that cruell judge of hell, saith,

'Castigatque, auditque dolos, subigitque fateri.'

First he punished before he heard, and when he had heard his deniall, he compelled the party accused by torture to confess it. To conclude this point, it is against Magna Charta. *Nullus liber homo aliquo modo destruatur.*"

To Chief Justice Holt we are indebted for bringing to an end the infamous practice of trying, convicting, and executing innocent men and women for witchcraft. It is perfectly astounding to people of the nineteenth century how men of the highest refinement and education in the time of the Stuarts could have entertained the superstitions which they protected by law. Sir Thomas More, who had an animus against the Lutherans, was said to have cast one man into prison in his own house, whipped him at the tree in his garden, called the Tree of Troth, and afterwards sent him to the Tower to be racked. More defended himself against this charge, saying that, in the course of his life, he had only ordered two men to be flogged. One was a man "who, after he had fallen into these

frantic heresies, soon fell into plain, open frenzy; albeit that he had been in Bedlam, and afterwards by beating and correction gathered his remembrance. Being therefore set at liberty, his old frenzies again fell into his head. Being informed of his relapse, I caused him to be taken by the constables and bounden to a tree in the street, before the whole town, and there striped him till he waxed weary. Verily, God be thanked, I hear no harm of him now."

It is somewhat strange to find the hard-headed Coke writing gravely about witchcraft, as if anybody really did "use, practise, or exercise witchcraft, inchantment, charme, or sorcery, whereby persons are killed, destroyed, wasted, consumed, pined, or lamed in his or her bodie, or any part thereof." In his "Institutes," he says that "the Holy Ghost hath compared the great offence of rebellion to the sinne of witchcraft." He asked what punishment there was against these devilish and wicked offenders before the statutes, which were made of very late time; and he determines it out of ancient books that, having left the ever-living God and sacrificed to the devil, they thereby committed idolatry in seeking advice of him, and were punished by death. In support of this he refers to a case which rather shows that even before his day our ancestors had a glimmering of common sense on the subject. A man was taken in Southwark, having in his possession "the face of a dead man" and a book of sorcery. Considering the times, this culprit was exceedingly fortunate, for Sir John Knyvet, the Chief Justice, merely swore him "that

from henceforth he should not be a sorcerer," ordering at the same time that he should be delivered out of prison, and that the head of the dead man and the book of sorcery should be burnt at Tuthill at the expense of the prisoner.

It is even more strange to find the enlightened Hale expressing the same belief. In the trial of witches which took place before him, and in which the imposture of their accusers was made clear to demonstration, he indeed left the evidence to the jury without comment, but added these words: "That there are such creatures as witches I make no doubt at all. For first, the Scriptures have affirmed so much. Secondly, the wisdom of all nations has provided laws against such persons, which is an argument of their confidence of such a crime." The poor wretches were then found guilty, and shortly after executed, but of course "confessed nothing."

Chief Justice Holt put a stop to these proceedings. Eleven persons being tried before him for witchcraft and acquitted, he ordered one of the accusers, by name Hathaway, to be prosecuted for a cheat and an impostor. Hathaway had for long pretended that he was bewitched by a woman named Morduck, vomiting pins, losing his sight, fasting for ten weeks, and suffering from a variety of diseases. The only relief which he found was in scratching the witch till he drew blood, when he generally felt better. The imposture was clearly proved. He was watched, and found to eat heartily during his fast; supplies of pins and nails were found concealed about his person; and by a trick

he was induced to scratch and draw blood from the wrong woman, when he at once pretended that he had recovered the use of his sight. A woman named Willoughby was called for the defence, and the following colloquy took place:—

L. C. J.: Do you think he was bewitched?

Willoughby: I believe he was, my Lord.

L. C. J.: I suppose you have some skill in witchcraft. Did you ever see anybody that was bewitched before?

Willoughby: My Lord, I have been under the same circumstances myself, when I was a girl, in Sir Edward Bromfield's time.

L. C. J.: How do you know you was bewitched?

Willoughby: There was a woman taken up upon suspicion for it.

L. C. J.: For bewitching thee?

Willoughby: Yes, my Lord.

L. C. J.: Did you scratch her?

Willoughby: My Lord, I had no power to do anything; I flew over them all.

L. C. J.: You say you were in the same condition with this man, and you say you flew. Did you fast too?

Willoughby: One held me by one arm, another by the other, and another behind, and I flew sheer over their heads.

L. C. J.: Woman, can you produce any of these women that saw you fly?

Willoughby: It was when I was a child; they are dead. It was in old Sir Edward Bromfield's time.

A Dr. Hamilton was called, and stated that one

night after dinner he went and inquired about Hathaway, and heard that he had strange notions.

Mr. Broderick: You say you reject everything except that of his fasting?

Hamilton: Yes.

L. C. J.: Doctor, do you think it possible in nature for a man to fast a fortnight?

Hamilton: I think not, my Lord.

L. C. J.: Can all the devils in hell help a man to fast so long?

Hamilton: No, my Lord, I think not; and that made me suspect him.

Lastly, one Spurling entered the witness-box, and said that he had visited Hathaway, because he heard that he was under a supernatural power.

L. C. J.: What did you think it was? Was it an infernal power?

Spurling: A diabolical spirit.

L. C. J.: Did you ever hear the power of a diabolical spirit described?

Spurling: But I suppose that those that are under witchcraft are under such a spirit.

L. C. J.: But can a diabolical spirit enable a man to fast forty days?

Spurling: I cannot tell that. I was acquainted with one that was under a supernatural power, who was in such a condition as this man was.

L. C. J.: Did he fast too?

Spurling: I know not that.

L. C. J.: I never heard that the devil ever made such a bold attempt.

Spurling: That person, the devil, acted him so subtilely that it was impossible to prosecute him.

L. C. J.: Was he not very well pleased to be bewitched?

Spurling: No, he was actually possessed.

In summing up the case to the jury, Holt said: "The prisoner became dumb, and after that he began to be blind; and being blind and dumb and fasting, these were looked upon to be the three tokens that he was bewitched. Then the man had a fancy that he was bewitched by this woman, therefore he must go and scratch her; which he did, and presently he could see and eat. It seems that this scratching was thought to be so effectual that he was well for about six weeks; after which he appeared to be ill again, and his sight and stomach were gone, and then it was proposed that he should scratch her again. The woman, Sarah Morduck, must be scratched again, which was performed with violence against her consent; but when she was pursued yet a third time by Hathaway and others, complaint was made on her behalf to Sir Thomas Lane. Thereupon it was thought convenient by Sir Thomas, in order to make a full discovery, that she should be scratched again, and accordingly she was persuaded to submit to be scratched again, and presently Hathaway did eat and drink very greedily. This was thought a great evidence of the man's being bewitched; what rule they have for it, either in philosophy or divinity, I cannot tell. That of our Saviour's fasting forty days is mentioned in Scripture as miraculous and an effect of divine power.

Who can imagine that, without such assistance, a man can fast forty days or above, and yet continue in health? I must leave you to consider with yourselves whether you have any evidence to induce you to believe it to be in the power of all the witches in the world, or all the devils in hell, to enable a man to fast beyond the time that nature will allow. They cannot invert the order of nature. . . Tricks the devil may play, but not work a miracle; it is not to be thought that God should let him loose so far.' The jury, without going from the bar, found the prisoner guilty, and one more burden of superstition was taken from English society. But we imagine that it required no ordinary strength of purpose to do what Holt did, when we find Roger North saying, "If a judge is so clear and open as to declare against that impious, vulgar opinion that the devil himself has power to torment and kill innocent children, or that he is pleased to divert himself with the good people's geese, pigs, butter, and cheese, and the like errors of the ignorant and foolish rabble, the countrymen cry, 'This judge hath no religion, for he doth not believe in witches;' and so, to show they have some, hang the poor wretches."

Duelling has always been contrary to the law of England; but it must be admitted that the pestilent custom was put down by public opinion, and not by process of law. Coke wrote: "It is against the law of nature and nations for a man to be judge in his own proper cause, *judex in propriâ causâ*, especially *in duello*, where fury, wrath, malice, and revenge are

the rulers of the judgment." And in the proceedings against Priest in the Star Chamber, in 1615, Bacon made the same principle quite clear to that tribunal, saying that he could see "no difference between an insidious murder and a braving or presumptuous murder but the difference between Cain and Lamech." And the court, "much misliking the confusion of degrees which is grown of late—any man assuming unto himself the term and attribute of honour—did utterly reject and condemn the opinion that the private duel in any person whatsoever had any grounds of honour. . . And finally the court, showing a firm and settled resolution to proceed with all severity against these duels, gave warning to all young noblemen and gentlemen that they should not expect the like connivance and toleration as formerly have been, but that justice should have a full passage, without protection or interruption;" Bacon and Coke, however, were probably the only two men of their day who could exchange "ill words" without a hostile meeting. The members of the Bar, it is true, have not always been as ready with their swords as with their tongues. A defendant, who had been satirically alluded to by Serjeant Davy, desired to have satisfaction for the affront. Going to the Serjeant's lodgings at Dorchester—for the matter happened on circuit—he burst into his bed-room.

Defendant: You well know what my errand is; satisfaction I must and will have.

Davy: My dear sir, I withdraw everything; I am exceedingly sorry.

Defendant: I am not to be appeased by apologies

or words; my honour has been tarnished, and I must insist on receiving the satisfaction due to a person of my figure.

Davy (from under the bed-clothes): Surely you don't mean to fall upon a naked man, unarmed, and in bed?

Defendant: Oh no, sir; you can't but know how this kind of business is conducted between gentleman and gentleman.

Davy: Well, if you give me your honour that you don't mean to fall upon me naked and unarmed in bed, I will give you mine that I will not get out of bed until you are gone from the town and I am in no danger of seeing you again.

But there have been fighting lawyers, amongst others being Lord Thurlow, who fought a duel in Kensington Gardens, and stood up to his adversary "like an elephant."

Sir George Mackenzie thus forcibly expressed the tyranny of society over law: "Duels are but illustrious and honourable murders. This is that imperious crime which triumphs over both public revenge and private virtue, and tramples proudly upon both the law of the nation and the life of our enemy." The feeling of society which sanctioned and encouraged duelling was too strong for the courts of justice, and even those whose function it was to suppress it were often tainted with the poison of this unwritten social law. Down to the beginning of this century there were, as in Bacon's time, "some counsel learned of duels, that tell young men when they are beforehand,

and when they are otherwise, and thereby incense and incite them to the duel and make an art of it." In spite of the good resolutions of the Star Chamber, the connivance and toleration—which they intended to withdraw—continued for two centuries to be granted in this country to those who engaged in duelling. In 1779, Erskine, in defending Lieutenant Bourne for sending a challenge to Admiral Sir James Wallace, his commanding officer, spoke with great freedom in support of the conduct of his client. The challenge was sent on account of the alleged tyranny of the Admiral; and thus did the great advocate, who had once been a midshipman himself, remark upon it: "I am not ashamed to acknowledge that I would rather be pilloried by the court in every square in London than obey the law of England, which I thus profess so highly to respect, in a case where that custom which I have reprobated warned me that the public voice was in the other scale. . . . I have had the honour to sail with a man who is an honour to that profession. Under him I learned what idea ought to be entertained on this subject, and what respect ought to be paid to officers in all stations; and the result of what I saw there, joined with my own original feelings, is this: that although I was placed on board his ship to reverence him as my father, by the command of my own, and although at this hour I do reverence him in that character, yet I feel that if he had treated me in that manner I should not have made Jamaica or Bath the limit of my resentments, but would have sought him through all created space till

he had answer made and done me justice. There are some injuries which even Christianity doth not call upon a man to forgive or to forget, because God, the author of Christianity, has not made our natures capable of forgiving or forgetting them."

In 1841, Sir John Campbell, as Attorney-General, prosecuted Lord Cardigan for fighting a duel with Captain Tuckett, and it was said by some that his speech contained a defence of duelling. He afterwards wrote an explanation of what he said, adding, "I consider that to fight a duel must always be a great calamity, but it is not always necessarily a great crime. . . . Even in Ireland a duel confers no *éclat;* and a recommendation of duelling from a judge sitting in his tribunal would excite as much astonishment in the Four Courts as in Westminster Hall. We may hope that from the progress of this feeling the practice may become extinct, and that we shall not in future witness that *conflict between law and manners* which arises on a trial for duelling."

So many absurd ideas have prevailed, and do still exist, with regard to the nature of an oath, that it may not be amiss to show that the matter was long ago settled on principle by the courts. There is no magic in an oath. In courts of justice the object is to ensure that witnesses should speak the truth, and an oath is administered to such as believe in a future state—not because there is any virtue in a set form of words, but because it is thought that under the sanction of an oath a witness is more likely to tell the truth. The object of an oath is lost when it is administered to a

man who has no respect for it. A Commission was sent to India, in 1739, for the examination of a person of the Gentoo religion, and it was directed that he should be sworn *upon the Holy Evangelists.* A motion to strike out the concluding words was actually resisted, but Lord Hardwicke said :—

"The defendant is of the Gentoo religion, and an idolater. The general rule is that all persons who believe in a God are capable of an oath; and what is universally understood by an oath is that the person who takes it imprecates the vengeance of God upon him if the oath he takes is false.

"It was upon this principle that the judges were inclined to admit the Jews—who believed in a God according to our notion of a God—to swear upon the Old Testament. And Lord Hale very justly observes, 'It is a wise rule in the kingdom of Spain that a heathen and idolater should be sworn upon what he thinks is the most sacred part of his religion.'

"In order to remove the difficulties in this case, I shall direct that these words—*upon the Holy Evangelists* — be left out. The next consideration is, what words must be inserted in their room? Now, on the part of the plaintiff in the cross bill, it is desired that I should appoint a solemn form for the oath; I think this very improper, because I may possibly direct a form which is contrary to the notions of religion entertained by the Gentoo people.

"I will therefore make this rule—that two or three of the Commissioners may administer such oath in the most solemn manner as in their discretions shall seem

meet; and if the person, upon the novel oath being explained to him, shall consent to take it, and the Commissioners approve of administering it (for he may be a Christian convert), the difficulty is removed; or if they should think proper to administer another oath, that then they shall certify to the court what was done by them.

"The words 'corporal oath' may stand for lifting up an arm, or other bodily member. This will come up to the meaning of a corporal oath." But upon the Attorney-General's suggesting that there might be no ceremonies in their form of taking oaths, these words were likewise left out, and the words "most solemnly" inserted in their room.

The whole question was again considered in 1744, when a similar Commission was issued in the case of *Omychund* v. *Barker*. Lord Hardwicke again explained the meaning of the oath. "The judges," said he, "and sages of the law have laid it down that there is but one general rule of evidence—the best that the nature of the case will admit.

"Suppose a heathen, not an alien enemy, should bring an action at Common Law, and the defendant should bring a bill for an injunction, would anybody say that the plaintiff at law should not be admitted to put in an answer according to his own form of oath? If otherwise, the injunction must be perpetual, and this would be a manifest denial of justice.

"This falls in exactly with what Lord Stair, Puffendorf, and others say—that it has been the wisdom of all nations to administer *such oaths as are*

agreeable to the notion of the person taking. This does not at all affect the conscience of the person administering, nor compel him in any respect to adopt such religion. It is not near so much a breaking in upon the rule of law as admitting a person to be evidence in his own cause."

In Queen Caroline's trial a question arose as to the mode of swearing some of the foreign witnesses, and in the discussion which followed Lord Erskine said: "I remember a case to have occurred when I was at the Bar. A person came into the court of King's Bench, in the time of Lord Kenyon or Lord Mansfield—I think Lord Kenyon. Lord Chief Justice Eyre was sitting in the other court. A witness came into the box, who did not describe himself to be of any particular sect entitling him to an indulgence, but stated that from certain ideas in his own mind he could not swear according to the usual form of the oath; that he would hold up his hand and would swear, but would not kiss the book. I have no difficulty in saying that I wished very much to get rid of that witness, and I asked what was his reason for refusing to be sworn in a certain form. He gave a reason which appeared to be a very absurd one, but it strengthens the very matter we are upon—'because it was written in the Revelations that the angel standing upon the sea held up his hand.' This appeared to me to be no very good reason. I said, 'This does not apply to your case; for in the first place you are no angel, and, secondly, you cannot tell how the angel would have sworn if he had been on shore.' The

Chief Justice sent into the Court of Common Pleas to ask the opinion of Chief Justice Eyre, which was that though this man could not swear himself to be of a particular sect, yet if he stated (whether his reason was a good or a bad one) that a particular form was consistent with his feelings of the obligation of an oath, and would be binding on his conscience, that was the oath which ought to be put to him; and that was administered. *The question is what the witness feels himself.*" The Lord Chancellor on the same occasion referred to a case in which Mr. Justice Gould met with a similar difficulty. A witness came before that judge at the Newcastle assizes who, for a very singular reason, refused to be sworn in the usual manner. He was a person "of some peculiar way of thinking in Scotland," and objected that he had once taken an oath—that he would never take an oath again. The judge was inclined, having brought the horse to the water, to make him drink, on the ground that the witness having once taken an oath could not be excused from taking another; but the man declaring that he usually pledged his conscience by holding up his hand, he was pledged to his evidence in that manner.

In the same debate, the Lord Chancellor said that "a man cannot be sworn in any particular form if he does not believe in the being of a God or a future state—if he has no such belief, he could not be a witness at all." This was certainly an advance from the doctrine of Coke, that "an oath is an affirmation or deniall by any *Christian*, calling God to

witness that his testimony is true." Both of these scruples are, so far as courts of justice are concerned, cured by legislation; but the parliamentary oath still sticks in the consciences of some people. The truth is that oaths are quite unnecessary and superfluous in a civilised State. The person who will not keep faith without an oath will not feel bound by reverence for mere words. Nor is there any assurance but his own word as to his religious belief and his confidence in the oath. The object of administering oaths and affirmations is, *as far as possible*, to bind a man's conscience; they are administered, not because they necessarily do bind the conscience, nor because it is thought that without them the conscience cannot be bound, but because they are believed to be the best means for securing good faith. If it is found that they do not materially assist that end, their use and meaning are gone.

The pitch of religious liberty and toleration at which we have now arrived is to some extent due to the liberal spirit of English judges. More has no doubt been done by legislation, but a few instances of judicial wisdom upon this head may be given. An application having been made in the King's Bench in 1780 for a mandamus to compel the admission of one Christopher Mends to the use of the pulpit of a Presbyterian meeting-house, as pastor, minister, or preacher, he having been duly elected thereto, Lord Mansfield said :—

"Here is a *function*, with *emoluments;* and the chapel being a Presbyterian meeting-house, no specific

legal remedy. The right depends upon election, which interests all the voters. The question is of a nature to inflame men's passions. Should the court deny this remedy, the congregation may be tempted to resist violence by force; a dispute as to who shall preach Christian charity may raise implacable feuds and animosities, in breach of the public peace, to the reproach of government and the scandal of religion. To deny this writ would be putting Protestant Dissenters and their religious worship out of the protection of the law. This case is *entitled* to that protection."

It became necessary shortly after the Restoration for the judges to decide, which they did with one dissentient, that a Dissenter from the Church of England is not guilty of a crime *barely* by virtue of his religious opinions. In Lord Mansfield's time religious intolerance had subsided to some extent, and Quakers were allowed to give evidence on affirmation in *civil* cases. In an action to recover penalties under a Bribery Act it was sought to exclude the evidence of a Quaker, on the ground that the proceedings were *criminal*. But Lord Mansfield would not allow this. "The legislature," said he, "formerly looked upon Nonconformists as criminals, and Quakers in particular as obstinate offenders. This only served to increase their number; if they had been let alone, perhaps they would not have come down to these times. The more generous and liberal notions of the present times do not look upon real scruples in the light of an offence.

"This sect sprang up during the troubles, and was found at the Restoration with many other sects of Nonconformists equally scrupulous. At that time the law considered their scruples of conscience a crime. Therefore when a Quaker, who was subpœnaed to give evidence, absented himself, and an attachment issued in consequence, he could not in excuse say that his conscience prevented him from giving evidence, for that was a crime. The consequence was that he was obliged to answer, or be committed to prison; and if his obstinacy continued, he lay there for life.

"Is this a *criminal* cause? A Quaker appears and offers himself as a witness; can he give evidence without being sworn? If it is a criminal cause, he must be sworn, or he cannot give evidence. It is as much a *civil* action as an action for money had and received. The legislature, when they excepted the evidence of Quakers from criminal causes, must not be understood to have meant causes technically criminal. The exception, however, is not to be extended by equity. Where there is a hard positive law, the reason of which is not very plainly to be seen, it ought not to be extended by construction."

Equally wise and liberal was the judgment of the same learned judge in a case which came before the House of Lords in 1780. The Corporation of London had passed a bye-law inflicting a severe fine on those who, being elected, should refuse to serve the office of sheriff. The bye-law was chiefly aimed at Dissenters, who of course could not take the sacrament according

to the rites of the Church of England. In the case in question, a Dissenter, being elected, pleaded that he was incapable of serving, because he could not fulfil the necessary requirements. In his judgment, Lord Mansfield said :—

"There is no usage or custom independent of positive law which makes Nonconformity a crime. There never was a single instance, from the Saxon times down to our own, in which a man was punished for erroneous opinions, but upon some positive law. The Common Law of England, *which is only common reason or usage*, knows of no persecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion there have been instances of persons prosecuted and punished upon the Common Law; but bare Nonconformity is no sin by the Common Law. Persecution is against natural religion, revealed religion, and sound policy. If Nonconformists accept office, punish them; if they refuse, punish them; if they say 'Yes,' punish them; if they say 'No,' punish them. My Lords, this is a most exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of; it is as bad persecution as that of Procrustes—if they are too short, stretch them; if they are too long, lop them."

In 1780 a Catholic priest was charged before Lord Mansfield with saying mass. By a penal statute he was liable to very serious consequences, if he had really done so; and probably there was no doubt that he was technically guilty. But, in placing the evidence before the jury, Lord Mansfield directed

them to acquit the man; because, although technically guilty, he ought not to have been proceeded against. He concluded his summing-up in these terms:—

"At the Reformation they thought it in some measure necessary to pass these penal laws; for then the Pope had great power, and the Jesuits were a very formidable body. Now the Pope has little power, and it seems to grow less every day. As for the Jesuits, they are banished from almost every State in Europe. These penal laws were not meant to be enforced except at proper seasons, when there is a necessity for it; or, more properly speaking, they were not meant to be enforced at all, but were merely made *in terrorem*. Take notice that, if you find this man guilty, the punishment is very severe—a dreadful punishment indeed! Nothing less than perpetual imprisonment."

But these sentiments were by no means shared by all Lord Mansfield's contemporaries. The Church partly believed him to be an unbeliever, and the old-fashioned lawyers accused him of arbitrarily extending his jurisdiction, and introducing doctrines unknown to the Common Law. Lord Thurlow, for example, having received a deputation from the Presbyterians on the subject of their civil rights, dismissed them, saying, "Gentlemen, if your sour old religion had been the Establishment, I might have complied; but as it is not, you cannot expect me to accede to your request." Lord Eldon was animated by the same spirit to a degree which was positively amazing. When the Bill for the repeal of the Test

and Corporation Act was before Parliament in 1828, he wrote thus respecting it :—

"I voted as long ago as in the years 1787, 1789, and 1790 against a similar measure; Dr. Priestly, a dissenting minister, then asserting that he had laid a train of gunpowder under the Church which would blow it up; and Dr. Price, another dissenting minister, blessing God that he could depart in peace, as the revolution in France would lead here to the destruction of all union between Church and State. The young men and lads in the House of Commons are too young to remember these things. . . . As the Bill is constructed, it operates not merely for *Protestant* Dissenters. It appears to me to be equally favourable to Roman Catholics, Deists, Infidels, Turks, Atheists. How the Bishops can have overlooked its extensive and deplorable effects is to me the most strange thing possible." He moved a number of amendments in committee, the inconsistency of which was pointed out by the Bishop of Chester, and he indignantly requested the right reverend prelate "to attend to his own inconsistency, and not gratuitously tender advice to others." When the Bill passed he was exceedingly downcast, and said, in a letter to his daughter, "I have fought like a lion, but my talons have been cut off. The Bill, in my poor judgment, is as bad, as mischievous, and as revolutionary as the most captious Dissenter could wish it to be." He was equally rabid on the subject of Catholic Emancipation, and, referring to the Act of Settlement in the Princess Sophia and the heirs of her body, *being Protestants,*

asserted that if the Ministry advised the King to consent to emancipation, they would be advising him "to give his consent to *a libel on his title to the throne.*" In spite of his devotion to the Church as an institution, it seems that he never attended Divine worship in London; and when rebuked by Lord Ellenborough on that account, replied that he went to church in the country. The answer did not satisfy the Chief Justice, who retorted, "as if there were no God in town!"

The law superintends all matters relating to marriage, from the promise to marry down to the decree of divorce. The subject therefore offers a wide field for the wit of judges and counsel, and has given rise to many wise and foolish sayings. It is impossible in these pages to trace the treatment which it has received at the hands of English lawyers, but one or two cases may not be amiss.

Lady Strathmore's marriage settlement is a matter of history. In 1789, being possessed of great property, both real and personal, she entered into a treaty of marriage with Mr. Grey, and with his knowledge conveyed all her personal property to trustees for her sole and separate use. A few days after the necessary deed had been executed, she heard that Mr. Bowes had fought a duel on her account with the editor of a newspaper in which her character had been traduced; she determined to marry him, and marry him she did the very next day. Bowes had never heard of the settlement, but when he ultimately discovered its existence, he went to the Court of Chan-

cery for the purpose of upsetting it. Lord Thurlow, in refusing to assist him, said :—

"As to the morality of the transaction, I shall say nothing to that; they seem to have been pretty well matched. Marriage in general seems to have been Lady Strathmore's object; she was disposed to marry anybody, but not to part with her fortune. The settlement is to be considered as the effect of a lucid interval; and, if there can be reason in madness, by doing this she discovered a spark of understanding. Even if there had been a fraud upon Grey, I would not have permitted Bowes to come here to complain of it. It is impossible for a man, marrying in the manner Bowes did, to come into equity and talk of fraud."

The judgment of Lord Justice Knight Bruce in *Barrow* v. *Barrow* is a masterpiece of irony and judicial wit. The suit was the result of an alliance between a solicitor and a widow, who for the first sixty days of married life lived as well as quarrelled together. At the end of that period, they agreed to abandon the domestic forum "for the more conspicuous, more disciplined, and more effectual warfare of Lincoln's Inn and Doctors' Commons." The Lord Justice, in disposing of the case, proceeded in this strain :—

"The courtship between Mr. Barrow and Mrs. Combes began not much, if at all, earlier than the year of their marriage, as to which his depositions contain a passage which in point of accuracy may be questionable, but in point of gallantry can scarcely

be so—namely, 'I did not begin to court her, but she began to court me.' And he thus (perhaps with equal gallantry) speaks as a witness of their ages: 'I was twenty-nine years old when I married her, and when I married her she acknowledged to being forty-five years old, but I believe she was more.' Certainly in 1850 she had achieved more than two-and-thirty years; she had become a widow in 1847. Her present husband and opponent, when he accepted or was accepted by her, was a practising solicitor, possessing little, if any, private fortune, but a bachelor; yet, though a bachelor, versed somewhat in the ways of women, as having at least eight living children by three living mothers—a combination of circumstances which, known to Mrs. Combes when she resolved to marry him, was not viewed by her as unrecommendatory of the proposed connection.

"Seldom on the whole can a couple before marriage have laboured so diligently to secure an unpeaceable life, while after it we find them, fresh from church, handselling the wedding-day by a testamentary controversy. For, under the marriage settlement of the evening previous, she had powers of appointment by will; and a will in exercise of them having been prepared for them overnight by the bridegroom, the nuptial festivities are terminated by this remembrancer of death, which they retire with a clergyman to consider in private; when, the paper, or part of it, being read, she observes that it bestows upon her consort a very substantial legacy, namely £5,000. To this, as diminishing materially a provision made by it in

favour of the eight children of the ladies of the latter —for whom, with no common generosity, she had intended to provide—the client demurs; and a debate follows, which after proceeding some way was adjourned, and the bridegroom and still intestate bride drive from Davies Street, where the breakfast was had, to her own house in one of the Eastern squares. There a warm interchange of sentiments ensues, which they both call an altercation—she in stronger terms than he uses—the subject being the £5,000 legacy. But the lady, after a time, stops the argument by acquiescing, and signs. This inauguration accomplished, the bridegroom and his testatrix set out for France and Italy on a honeymoon tour—not altogether a halcyon one, but proving in truth an untoward expedition, in which not they alone but their companion, the will, also suffers. For, in an affair at Pisa, where for a time their quarters were, the lady appears to have torn it piecemeal, *animo* (as lawyers say) *cancellandi*. The husband seems to have collected the bits, which are produced here from his custody, but in a state of conglutination and cohesion absolutely disavowed by her, and necessarily to be ascribed to him."

It is impossible to embark here upon the subject of breach of promise of marriage. Judges, as a rule are in favour of retaining the action, and there are certainly a few cases in which it is useful. But its evils outweigh its advantages. *Spretæ injuria formæ* is as natural now as when Paris preferred Venus to Juno and Minerva on the Trojan hills; and most

actions are prompted by the feelings to which Dido confessed, when Æneas deserted her—

> "But soon the Queen perceives the thin disguise:
> What arts can blind a jealous woman's eyes?
> She was the first to find the secret fraud.
> . . . 'And must I die?' she said;
> 'And unrevenged? 'Tis doubly to be dead.'"

What is known as the liberty of the press has been very grudgingly conceded by the wisdom of judges; probably from the fact that until the present day the occupants of the Bench were nearly always political partisans. Lord Hardwicke said: "The liberty of the press is generally taken for a liberty to publish every indecency against the most respectable persons, either in public or in private life; and I have never known an instance of a libeller being prosecuted without a loud cry of 'oppression,' he being considered an impersonation of the liberty of the press. Before the art of printing was known in Europe, learning was confined to a very few. When printing was introduced, the regulations which existed fell to the ground, and every one for a while could communicate his thoughts to the world on any subject, till printing under new regulations became an affair of State. Thence arose the expression of *the liberty of the press.* But in England the mode of publication made no change in the law of defamatory libel; the press acquired no liberty which was not known in the most remote times." Thurlow was an obstinate opponent of the popular

side of the question. A proposal being made to take away the Attorney-General's right to file criminal informations, "I cannot applaud," said he, "those oblique reflections which, in imitation of pamphleteers and newsmongers, honourable members seem so fond of casting in this House. Such strokes may serve as stilts to raise the authors up to the notice of the mob, but will not add to their character in this assembly. The artifice is too gross to succeed. There is no lawyer within these walls who will not allow all the prosecutions lately carried on by the Attorney-General were extremely proper, if not necessary. Why then should we, when no real danger, no late encroachment presses, sally forth like a band of Quixotes to attack this windmill of a giant—this imaginary magician, who keeps none of our rights, none of our privileges, under the power of his enchantments? Not a single wight, not a single damsel, has he injured. All who pretend to dread him walk at large—ay, more at large, I suspect, than they ought. Our booksellers and printers have no reason to complain of being held in trammels. Shall we give licentiousness an ample range? For my own part I cannot but consider the project as a crazy conceit, solely intended for gaining a little popularity; for men, however helpless, will 'spread the thin oar, and catch the driving gale'—the popular breeze, whose murmur is so soothing to certain ears. If no other process is left but that of bringing the offender against a grand jury, no offender can be brought to justice. The licentiousness of the press will increase; crimes

will multiply; nothing will be published but libels and lampoons; the press will teem with scurrility and falsehood. The minds of the people will be misled; the many-headed beast will swallow the poison, and the land will consequently be one scene of anarchy and confusion." For many years a deadly struggle was continued, which practically involved the principle of the liberty of the press. The technical question was whether juries were to be permitted to decide whether words were libel or no libel. On this great question Thurlow said: "The construction of libels belongs by law and precedent to the judge, and not to the jury; because it is a point of law which they are not competent to decide. If any other rule prevailed—if the matter were left to the jury—there would be nothing fixed or permanent in the law. It would not only vary in different counties and cities, according to their different interests and passions, but also in the minds of the same individuals, as they should happen at different times to be agitated by humours and caprices. God forbid that the laws of England should ever be reduced to this uncertainty! All our dictionaries of decisions, all our reports, and 'Coke upon Littleton' itself would then be useless. Our young students, instead of coming to learn law in the Temple and in Westminster Hall, would be obliged to seek it in the wisdom of petty juries, country assizes, and untutored mechanics. Adieu to precision, adieu to consistency, adieu to decorum! All would be perplexity, contradiction, and confusion. The law would be like Joseph's coat, become nothing but a

ridiculous patchwork of many shreds and many colours —a mere sick man's dream, without coherence, without meaning—a wild chaos of jarring and heterogeneous principles, which would deviate farther and farther from harmony. Yet the prevention of this state is the crime with which our judges are charged! *O tempora! O mores!* To what are we at last come!"

Wedderburn's celebrated speech on the same question, but from the right point of view, may be given as a contrast to the brutal illiberality of Thurlow. "While matters continue on their present footing, judges and juries will be eternally at variance. A constant struggle for superiority will subsist, and justice, being placed in the middle between them, will be mangled and torn in pieces. Acted upon by two forces in opposite directions, it will share the fate of criminals whose limbs are tied to the tails of wild horses. Juries thinking law and liberty to be at stake, and judges standing up for their own authority and what they consider the cause of order, neither will give up the contest till the land become one scene of anarchy and misrule. Indeed, who does not see that this is already the case? The most audacious libellers cannot be convicted; secure in the opposition of juries they laugh at all the terrors of *ex officio* informations. The Attorney-General, with all his power, is despised. Like an old worn-out scarecrow in a field, his head is made a roosting-place, or something worse, by these obscene birds. It is time for us to reconcile the practice of the law with the principles

of the Constitution. Juries seem to me not only the proper but the sole judges of the intention, the innocence, or malice of a libel, because it is really and essentially a matter of fact and not of law. What passed in the Roman Senate for polite raillery, would be in this House deemed a gross affront, and perhaps lead to bloodshed. What Roman virtue called 'Attic eloquence,' modern honour would construe 'rude Billingsgate.' Libel is founded entirely on public opinion. Who then so proper as the people to determine the point? In our legal system there is nothing that can boast a preference to the institution of juries. The plan is great, comprehensive, noble, and well worthy of its royal founder. Judges may err, judges may be corrupt. Their minds may be warped by interest, passion, and prejudice; but a jury is not liable to the same misleading influences. Twelve men of the vicinage, chosen as they are, can have no bias, no motive to show favour or malice to either party. Ask a foreigner what are his ideas of English liberty. He will tell you, with uplifted hands and a look of admiration, that it consists in the right which every Englishman has of being tried by his equals. But where is the propriety of any panegyric if the jury are only to try the most insignificant part of a cause, and leave the rest to the judge, who is not the equal of the accused? Were the proposed scheme adopted, the present ferment would subside, and juries would spontaneously give a check to the licentiousness of the press. I think no restrictions are necessary. I am far from adopting the creed of my honourable

and learned friend, the Attorney-General—'that if we were less learned, we should be better men.' I hold, on the contrary, that the diffusion of learning by the liberty of the press is necessary to public liberty and morality. What, then, would become of us without the press? Were an *imprimatur* clapped upon it, and a licenser appointed, we should soon come to the last stage of barbarism. We should be worse than Turks and infidels; the setting of the sun of science being much more gloomy and dismal than the dark hour which precedes its rise. Let us, then, guard the liberty of the press as watchfully as the dragon did the Hesperian fruit. Next to the privileges of this House and the rights of juries, it is the main prop of the Constitution. Nay, without it I fear the other two would prove very ineffectual. Though it be sometimes attended with inconveniences, would you abolish it? According to this reasoning, what would become of the greatest blessings of society? None of them come pure and unmixed. Religion itself is apt to degenerate into enthusiasm or superstition. Must we therefore exterminate Christianity? God forbid! Why then be so severe on the liberty of the press? If it poisons the minds of the people, it likewise administers an antidote. The same waggons, the same flies and stages, that carry down into the country the lies of faction, carry down also the counter-statements of the Ministry. *If any one is bit by the tarantula of the Opposition, he is cured by the music of the Court.*"

Judges have often contributed to social reforms

by refusing to try cases which relate to brutal sports. Lord Tenterden repeatedly declined to settle disputes arising out of dog-fights; Lord Loughborough refused to adjudicate upon a game at hazard; and Lord Ellenborough nonsuited a plaintiff who sued for the stakes of a cock-fight. "Cock-fighting," said the last-named judge, "must be considered a barbarous diversion, which ought not to be sanctioned in a court of justice. I believe that cruelty to animals, in throwing at them, forms part of the dehortatory charge of judges to grand juries; and it makes little difference whether they are lacerated by sticks and stones or by the bills of each other. There is likewise another principle on which, I think, an action on such wagers cannot be maintained; they tend to the degradation of courts of justice. It is impossible to be engaged in ludicrous inquiries of this sort consistently with that dignity which it is essential to the public welfare that a court of justice should always preserve."

Such pastimes have now fallen within the Criminal Law, but the detection of the culprits is not always easy, and it is still more difficult to bring them to justice. Prize-fighting and cock-fights continue to be regarded by some degraded Englishmen as honourable sports. Still the fact remains that animals are protected by law—a result which is greatly due to the efforts of Lord Erskine. In moving the second reading of his Bill in 1809, he said: "Nothing is more notorious than that it is not only useless but dangerous to poor suffering animals for a humane man to reprove their oppressors, or to threaten them with punishment. The general

answer, with the addition of bitter oaths and increased cruelty, is '*What is that to you?*' If the offender be a servant, he curses you, and asks '*if you are his master.*' The validity of this most infamous and stupid defence arises from that defect in the law which I seek to remedy. Animals are considered as *property only;* they are without protection—the law regards them not—they have no *rights.* . . . As to the tendency of barbarous sports to encourage national manliness—the only shadow of argument I ever heard on such occasions—all I can say is this: that from the mercenary battles of the lowest of beasts (human boxers) up to those of the highest and noblest which are tormented by man for his degrading pastime, I enter this protest against such reasoning. I never knew a man remarkable for heroic bearing whose very aspect was not lighted up by gentleness and humanity, nor a kill-and-eat-him countenance which did not cover the heart of a bully or a poltroon."

CHAPTER VII.

ADVOCACY.

Rhetoric and Unjust Causes—Nonsense—Hostile and Unwilling Audiences—Bacon a Perfect Speaker—Trickery—"Taking by Admittance"—Independence.

ADVOCATES may in a certain sense be separated into two classes. There is the advocate who has a sort of instinct for seeing the point upon which each case

hinges, and who, regardless of all side issues, however inviting, concentrates the whole of his strength upon the essential question. Such is the advocate proper for what is called a good case, and such is the temper of the man who makes a good judge. But this kind of genius is not so well suited for contesting doubtful causes; because what is actually a source of strength to him in the one case renders him inefficient in the other. There are, on the other hand, men who have the faculty of seeing the plausibility of every point in a case, but who cannot recognise that one is paramount and the others mere excrescences. Advocates of this stamp are more successful in doubtful cases, because by the subtlety of their argument they draw off the attention of their hearers from their points of disadvantage, and perplex even their own intellectual vision.

Sir Matthew Hale was an exaggerated instance of a plain pleader. He held the flowers of eloquence in the greatest contempt, alleging that soft words were only a respectable means of bribing the fancies and biassing the affections of judges and juries. He "wondered much at that affectation of the French lawyers in imitating the Roman orators in their pleadings; for the oratory of the Romans was occasioned by their popular government, and the factions of the city; so that those who intended to excel in the pleading of causes were trained up in the schools of the rhetors, till they became ready and perfect in that luscious way of discourse. He wondered to find the French so fond of imitating that which was an ill effect of the popular government of Rome.

He therefore pleaded himself always in few words and home to the point." This view of an advocate's duty is, however, not accepted at the present day. It is only congenial to the excessive virtue of men who, like the Emperor Titus, sigh to lose a day, or, like Hale himself, make a point of rising from every meal with their appetite unsatisfied. "If he saw a cause was unjust, he for a great while would not meddle further in it, but gave his advice that it was so. If the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice; and he used to say that it was as great a dishonour as a man was capable of, that for a little money he was to be hired to say or do otherwise than as he thought." No one can say anything against this part of his conduct, which Lord Erskine may be said to have faithfully followed when, being consulted in a certain case, he gave his opinion in these simple words: "This action will not lie, unless the witnesses do."

But advocates are bound to believe in the honesty of their instructions until they have good reason to doubt them. In the Dean of St. Asaph's case, Erskine went so far as to pledge his honour on the justice of the defendant's case. "Following," said he, "the example of my learned friend, who has pledged his personal veracity in support of his sentiments, I assert this upon my honour to be my unaltered, and I believe I may say unalterable, opinion, formed upon the most mature deliberation; and I choose to place that opinion in the very front of my address to you, *that*

you may not in the course of it mistake the energies of truth and freedom for the zeal of professional duty. In such a case a man disgraces himself, dishonours his profession, and betrays his country, if he does not step forth in his personal character and vindicate the rights of his fellow-citizens which are attacked through the medium of the man he is defending. Gentlemen, I do not shrink from that responsibility upon this occasion; *I desire to be considered the fellow-criminal of the defendant, if by your verdict he should be found one.*" But it is not necessary to go quite so far in every case; and Erskine himself was wont to rally his adversary on shooting "arrows from the quiver of his client," or "introducing his own evidence without the ordinary ceremony of being sworn." On one occasion he told a jury that he and his learned friend had been "brought there for the express purpose of disagreeing in everything."

Whatever merit there may be in the simple tactics of Sir Matthew Hale, it must be remembered that judges and juries are not mere machines for the reception of logical arguments. They are of like passions with other men, and take with more relish that which is invitingly placed before them. Moreover, it often happens that the full force of an argument does not come home until it has been reiterated again and again in the course of a long speech. It is a very proper theory that counsel should not talk nonsense, and that judges should take care that they do not do so. But there is always a natural hostility between the judge and the advocate,

unless the former has made up his mind to a favourable judgment; and although a judge may think that an argument is nonsense, the advocate may have an equally strong opinion to the opposite effect. Where such a conflict of opinion arises, the office of the advocate is one of extreme delicacy. In some cases his best course is to abandon his point—at all events for the time; but if it is necessary for him to persevere, he has need of no common amount of courage and tact. To speak to an unwilling or hostile audience, especially an audience deserving of respect, is a strong trial of a man's capacity. We have from Lord Erskine, who was an incomparable advocate, a description of the effect produced upon him by such an audience. He never succeeded as a speaker in the House of Commons, and of this fact he himself said: "I have been accustomed, during the greatest part of my life, to be animated by the hope and expectation that I might not be speaking in vain, without which there can be no spirit in discourse. I have often heard it said, and I believe it to be true, that even the most eloquent man living (how, then, must I be disabled?), and however deeply impressed with his subject, could scarcely find utterance if he were to be *standing up alone, and speaking only against a dead wall.*"

Experience, moreover, teaches the most careful of advocates that it is a good general rule to stir all the points which can tell in his favour, even although some of them appear to have but slight foundation. If the law were precise, it might be otherwise; but the law is not precise, and a man

often finds that the grounds on which he looked for a clear judgment in his favour are treated with scant courtesy by the court, while he rides off upon some other point of which he himself had but a mean opinion. It was probably for some such reason that Hale, as we learn from Burnet, "abated much of the scrupulosity he had about causes that appeared at first view unjust."

Perhaps the qualities attributed by Ben Jonson to Bacon represent a speaker as nearly as possible perfect. "There happened in my time," says that elegant writer, "one noble speaker, who was full of gravity in his speaking. His language, when he could spare or pass by a jest, was nobly censorious. No man ever spoke more neatly, more pressly, more weightily, or suffered less emptiness, less idleness in what he uttered. No member of his speech but consisted of his own graces. His hearers could not cough or look aside from him without loss. He commanded when he spoke, and had his judges angry and pleased at his devotion. No man had their affections more in his power. *The fear of every man who heard him was lest he should make an end.*" From this description it would seem that Bacon had a gift of speech which was often observed in the addresses of the late Lord Justice Thesiger—namely, that no word which he used was wasted or slurred over. On the theory that if a word is worthy of being used at all it ought to be well spoken, he developed a style of oratory which enabled his audience to retain and understand every word he spoke.

On the other hand, it is not to be imagined that eloquent oratory is all, or even half of, the qualification of a good advocate. Some men have thought otherwise, and amongst others, if we may believe Lord Campbell, Lord Brougham fell conspicuously into the mistake. The most effective of speeches will not make up for neglect in the introduction of a case, or in the regulation of evidence. Juries are especially open to impressions, and it takes a good deal of oratory to wipe out a hostile disposition. But it is equally erroneous to fall into the opposite extreme, and imagine, as many lawyers as well as laymen do, that verdicts and judgments are to be won by trickery. It is true that some men do attempt to throw dust in the eyes of jurors and of judicial wisdom itself. On one occasion, before the days of Judicature Acts, a very eminent Attorney-General appeared, with the late Mr. Justice Archibald, before the Exchequer Chamber at Westminster, to argue a case of some importance. In the course of his argument, he advanced in favour of his views a proposition which had never been heard of before, and has never been suggested since that occasion. It was, however, put forward with great assurance and plausibility, and the seven judges, assembled to determine the matter, listened to it in silence and without any outward appearance of misgiving. At last the junior puisne present, either from motives of curiosity or an idea that Mr. Attorney might be imposing upon the Bench, ventured to ask if there were any authorities on the point. The reply was, "Yes, my Lord, the authorities

are all here; they are in the hands of my friend, Mr. Archibald, who will produce them when the proper moment arrives." Mr. Archibald had no such authorities, for the best of all reasons—namely, that they did not exist; and it is needless to say that they were never produced. Lord Campbell, in referring to impostures of this kind, speaks ironically of an advocate who was threatened with being compelled to cite his cases on affidavit. Such tricks are always fatal in the end to those who indulge in them, and it is truly "better to be good than clever." Lord Campbell, in his "Life of Lord Lyndhurst," says: "I was often his junior, and on one of these occasions, when he was stating a triumphant defence, which we had no evidence to prove, I several times plucked him by the gown and tried to check him. Having told the jury that they were bound to find a verdict in his favour, he was leaving the court; but I said, 'No, Mr. Attorney, you must stay and examine the witnesses; I cannot afford to bear the discredit of losing the verdict from my seeming incompetence. If you go, I go.' He then dexterously offered a reference, to which the other side, taken in by his bold opening, very readily assented." From the same authority comes a story about Clarke, who was leader of the Midland Circuit. When Clarke had by similar tactics brought a case to a satisfactory compromise, his attorney, coming to him privately, said, "Sir, don't you think we have got very good terms? But you rather went beyond my instructions."

"You fool!" retorted Clarke. "How do you

suppose you could have got such terms, if I had stuck to your instructions?"

Most apocryphal stories are told of the expedients by which smart counsel have gained verdicts. Not the least ridiculous is one respecting a case in which Mr. Justice Gould was the judge, and Erskine counsel for the defendant. The judge entertained a most unfavourable opinion of the defendant's case, but being very old, was scarcely audible, and certainly unintelligible to the jury. It is said that, while he was summing up the case, Erskine, sitting on the Queen's Counsel's bench and full in the view of the jury, nodded assent to the various remarks which fell from the judge; and the jury, imagining that they had been directed to find for the defendant, immediately did so. Not many verdicts are to be won in this way; more solid abilities are necessary to the successful advocate. Some think that there is great merit in a loud voice and a hectoring manner. As the wisest of mankind put it, "Some think to bear it by speaking a great word, and being peremptory; and go on and take by admittance that which they cannot make good." Doubtless the power of *assertion* is of great use to a man, and serves to cover many deficiencies of argument. But some persons actually think that a man is unfitted for forensic contests unless he has a loud voice, and a coarse, personal humour. It was objected to Hale that, from his deficiencies in that respect, he was unfitted for taking a part in criminal trials and State prosecutions. But he held a lead in Westminster Hall far in advance of all

his contemporaries; and it may be observed, with regard to the present time, that the men who occupy the highest judicial offices in the kingdom, although they have neither loud voices nor a truculent demeanour, are the most distinguished advocates of their day.

The skilful advocate always keeps his hand upon the pulse of his tribunal; and the moment he feels that his argument is not in accord with it, retires to deliver his attack from another point of view. But cases occur in which a collision and open war are inevitable, and in which it is the advocate's duty not to flinch from withstanding the judge. Such cases are, however, rare. In the Queen's case Lord Eldon made a complaint in these terms: "Something like a threat was held out to your Lordships that if you passed judgment against the Queen you would never have the power of passing another judgment. However that may be, I will take upon myself to declare that an address of such a nature, such an address of intimidation to any court of justice, was not until this hour considered to be consistent with the duty of an advocate; and that whether an advocate has a right to make it or not, it ought to have no effect whatever on your Lordships." Brougham had certainly told them that a judgment passed against the Queen would recoil on the heads of those who gave it. But threatened lives have a long continuance, and the House of Lords still exists for judicial and political purposes very much as it was fifty years ago. The language of Lord Denman, also, in the same case, was

certainly very strong; but it was justified by the facts, and is a noble instance of his fearlessness as an advocate. The Duke of Clarence had endeavoured to injure the cause of the Queen by circulating calumnies concerning her among her judges—a practice with which Lord Denman dealt in these words: "To any man who could even be suspected of so base a practice as whispering calumnies to judges, distilling leprous venom into the ears of jurors, the Queen might well exclaim, 'Come forth thou slanderer, and let me see thy face.' . . . Had I not known of its existence in the high places of the earth, I should have held it impossible that any one with the heart of a man, or with the honour of a peer, should so debase his soul and degrade his honour. I would charge him as a judge, I would impeach him as a judge; and if it were possible for the Blood Royal of England to descend to a course so disgraceful, I should fearlessly assert that it was far more just that such conduct should deprive him of his right of succession than that all the facts alleged against Her Majesty should warrant your Lordships in passing this Bill of degradation and divorce." He was made by a vindictive adversary to suffer for his independence, but he rose proportionately in the public estimation. Very different was the conduct of Norbury and Maynard, who, being retained for John Lilburne when he was prosecuted by the orders of Oliver Cromwell, contrived to be "sick or out of town."

CHAPTER VIII.

ADVOCACY (*continued*).

Persuasion—External Appearance—New Audiences—Murray's Statement—Great Words—Interrogation—Invective—Well-imagined Nonsense—Irony—Quotation—Retort—Pure Eloquence—Peroration.

THE prevailing weakness of advocates is their disposition to forget that the object of their efforts is to *persuade* their judges. They think too much about the wishes of their clients and solicitors, or the opinions of their friends out of doors; whereas the one question for them is—how will the matter affect the minds of those who have to decide? In comparing Erskine and Brougham as advocates, it used to be said that, although both were men of great power and eloquence, Erskine never spoke a word except with a view to the verdict, while Brougham was perfectly satisfied if he made a brilliant speech. Brougham's weakness in this respect became still more marked when he was brought in contact with that extraordinary verdict-getter, Sir James Scarlett. It is fair to say that Scarlett was an exceptionally successful advocate; so much so that, when some one was speaking in praise of his skill, a north-country juror remarked that it was no wonder he succeeded, as he was always on the right side. The common feeling with regard to his merits led to the composition of the

following pleasantry, which is preserved by Lord Campbell:—"Whereas Scarlett had contrived a machine, by using which, while he argued, he could make the judges' heads nod with pleasure, Brougham in course of time got hold of it; but not knowing how to manage it when he argued, the judges, instead of nodding, shook their heads."

The art of persuasion is only to be acquired by those who take the trouble to consider to whom and with what object they speak. Only to the true advocate are made such remarks as fell from Lord Nottingham, when Somers, following five or six leaders, refused to take up his Lordship's time by repeating what had already been so well said. "Mr. Somers," said the Father of Equity, "pray go on. I sit in this place to hear everybody. You never repeat, nor will you take up my time; I shall therefore listen to you with pleasure." Even outward considerations are not despised by the good advocate. Erskine was exceedingly particular with regard to his appearance in court, and, although it is natural to laugh at his particularity, he was right. When he was taken down on special retainers to distant parts of the country, he always made a point of inspecting the court and taking in its bearings the night before he appeared in it. This was no idle precaution; for men generally feel strained in an unfamiliar place, as well as before a strange audience. Even the veteran Eldon feared a new audience. In one of his letters he wrote: "I am down here (Westminster) to give a charge to my old friends, the Pix jury, as to-day is

the trial of the coin and the Goldsmiths' dinner. I am always a little nervous before I make this sort of address; and such a strange being is man that, though I could talk before a Parliament with as much indifference as if they were all cabbage plants, *a new audience has ever borne an appalling appearance.*"

One of Lord Mansfield's detractors asserted that from the harshness of his voice he was called "Orator Strix," adding that, when at the Bar, he assumed a bullying audacity in his manner, and seemed by a pertinacious importunity to overbear rather than gain the Bench. This was probably mere calumny, but it was frequently said in his time that "Murray's statement" was worth a hundred arguments. There is a world of truth in this. Many men look upon their facts as hard, unchangeable things, which only serve to shape their arguments. They do not realise that they are susceptible of taking on different colours. Facts are not unlike rocks, which, indeed, never change, but, according as the sun shines at mid-day or in the evening, or does not shine at all, adopt the colour of the light which falls upon them.

The power of assertion, of using "great words," and taking "by admittance" that which it is difficult to make good, is very useful to an orator. But it is only the man who can assert in a manner which defies or terrifies contradiction who can use it with effect. Lord Thurlow was an excellent instance of asserting genius. His great word was always accompanied by "sound and fury," and by means of the two weapons he made himself a very formidable antagonist in

debate. When a proposal was made to establish a sinking fund for the redemption of the National Debt, he disposed of it in these terms: "The Bill exhibits a degree of presumption and arrogance in dictating to future Parliaments which, I trust, the House will never countenance. None but a novice, a sycophant, a mere reptile of a minister, would allow this Act to prevent him from doing what in his own judgment circumstances would require at the time; and a change in the situation of the country may render that which is proper at one time inapplicable at another. In short the scheme is nugatory and impracticable—the inaptness of the project is equal to the vanity of the attempt." Lord Brougham, being accused, when he proposed his scheme for forming the Judicial Committee of the Privy Council, of wishing to make himself President, gave vent to the following extraordinary combination of great words:—"I am rather astonished—if indeed, after living so long, I can be astonished by anything—that the motive assigned to me for bringing in this Bill is that I want to make a place for myself. However, I ought not to be astonished at this assertion—considering the numerous race it belongs to—engendered by malice and her bastard-sister falsehood—both begotten by the father of lies upon the weakness of human nature."

Lord Thurlow was very fond of the interrogative style of oratory, by means of which he was able to give many a home thrust. Thus, in a debate on the judicial independence of Ireland, he said: "The noble Duke (Portland) tells us he looks round for confidence,

and claims it from the tenour of his past life. I am in great doubt, my Lords, respecting the meaning of this word '*confidence*.' Does it mean that his Grace has no other plan in view?—that his Cabinet have no plan for the Government of Ireland?—that they have taken this Bill up without inquiry, without consideration, without caring whether it goes far enough or too far? Or does it mean that they have a fine system to develope, but that we must trust to their good character till the day arrives for making it known? Let me have the English of the word confidence. Unless it means no plan, no claim can be laid to it by this untried administration."

But the advocate has sharper weapons, which, in proportion to their sharpness, are dangerous to him who uses them. Perhaps the most powerful, and at the same time fatal, invective in the English language is to be found in Wedderburn's condemnation of Benjamin Franklin. Franklin was agent for the Province of Massachusetts, and by some not strictly honourable means had got possession of letters written by the Lieutenant-Governor and Chief Justice of the province, in which the employment of a military force was suggested. These letters he made public, and a petition was sent to the King by the House of Assembly, praying for the recall of the Lieutenant-Governor and the Chief Justice. The matter was referred to the Privy Council, at a meeting of which Wedderburn spoke in his capacity as Solicitor-General as follows:—"How the letters came into the possession of any one but the right owners is still a mystery

for Dr. Franklin to explain. He was not the rightful owner, and they could not have come into his hands by fair means. Nothing will acquit Dr. Franklin of the charge of obtaining them by fraudulent or corrupt means, for the most malignant of purposes—unless he stole them from the person who stole them. This argument is irrefragable. I hope, my Lords, you will mark and brand the man, for the honour of this country, of Europe, and of mankind. Private correspondence has hitherto been held sacred in times of the greatest party rage, not only in politics but in religion. The betrayer of it has forfeited all the respect of the good, and of his own associates. Into what companies will the fabricator of this iniquity hereafter go with an unembarrassed face, or with any semblance of the honest intrepidity of virtue? Men will watch him with a jealous eye—they will hide their papers from him, and lock up their escritoires. Having hitherto aspired after fame by his writings, he will henceforth esteem it a libel to be called a *man of letters—homo trium literarum.* But he not only took away these papers from one brother, he kept himself concealed till he nearly occasioned the murder of another. It is impossible to read his account, expressive of the coolest and most deliberate malice, without horror. Amidst these tragical events—of one person nearly murdered, of another answerable for the issue, of a worthy Governor hurt in the dearest interests, the fate of America in suspense—here is a man who, with the utmost insensibility of remorse, stands up and avows himself the author of all. I can

compare him only to Zanga in Dr. Young's 'Revenge':—

> 'Know, then, 'twas I;
> I forged the letter—I disposed the picture—
> I hated, I despised—and I destroy.'

I ask, my Lords, whether the revengeful temper attributed by poetic fiction only to the bloody-minded African is not surpassed by the coolness and apathy of the wily New Englander." The subject of these remarks was present when they were spoken, and it is said that but for his implacable resentment there would have been no American War.

"There are," said a great advocate, "moments when jarring opinions may be given without inconsistency, when Truth herself may be sported with without the breach of veracity, and when *well-imagined nonsense* is not only superior to, but is *the very index to wit and wisdom.*" Mr. Solicitor-General Wedderburn was a great master of ridicule and well-imagined nonsense. In 1771 some excitement was caused in parliamentary circles by the publication in the newspapers of the debates of the Houses of Parliament. One Twine Carpenter, a printer's devil, having laid hold of Mr. Wheble, his master, who had been guilty of the offence of printing the parliamentary debates, conducted him to the Mansion House, and claimed the reward offered by proclamation for such arrests. The printer was released by Wilkes, and it was objected that the whole matter was got up with the collusive object of obtaining the reward. The Solicitor-General spoke thus on the subject:—"Sir,

whether the proclamation be legal or not, I shall not now say. A Court of Law is the proper place to determine that question. As to Mr. Twine Carpenter, for whom the honourable gentleman is so warm an advocate, I shall certainly resist giving him any countenance. He is nothing more nor less than a familiar of Mr. Wheble, called his devil; by a bargain between this devil and Wheble, the devil arrests him. Now, as it manifestly appears that the devil and the printer are in compact, I think the wisest thing we can do is to leave the devil to the printer, and the printer to his devil. Whether printer beats devil, or devil beats printer, is of no consequence. There is the devil to pay; but that is nothing to us. I hope the devil will find no friends in this House, and that however busy he may have been in the city, and however busy the city may have been with him, we shall have nothing to do with him, nor give him an opportunity of having anything to do with us."

In a debate in 1770, on a motion that in matters of elections the House of Commons is bound to judge according to the law of the land, Lord North said that he should be glad to know what motions were to follow, before he accepted it. Thereupon "Mr. Wedderburn observed that Lord North, with respect to the motion, acted like an old woman who, being examined as a witness and asked her name, said that she would not tell it till she knew what questions were to follow. He said he was glad that the noble Lord had nothing to object to the question but that it

was unnecessary; but hoped that objections of another kind against the noble Lord's amendment were so manifest as that no gentleman would vote with him in it."

The following is a good instance of the ironical vein of the same orator. In 1789 it was proposed that the Queen should have the appointment of the officers of the household during the retirement of the King, because it was urged that the King, on awaking from his trance, would be displeased if alterations had been made. Wedderburn, in resisting this proposal, said: "Suppose that his Majesty's trance had taken place some years ago, would it have been any consolation to him if his Ministers, on their first audience after his awaking from it, had thus addressed him:—'Your Majesty has lost thirteen colonies, but—your palace stands where it did! Millions of national debt have been accumulated, but—your lords with white staves stand where you left them! Much of the best blood of your subjects has been spilt, but—not a page of the back stairs has been removed! Many calamities have happened in consequence of your son and representative being deprived of the constitutional power which your Majesty enjoyed, but—be not concerned, the same beef-eaters, holding the same halberds, still surround you. Weep not for national disgrace and universal suffering, for—peruse the Red Book and you will find it as you left it.' When his Majesty is restored to reason, he will feel insulted by those who impute to him such paltry and childish considerations, instead of the en-

lightened patriotism which belongs to the father of his people."

The irony of Erskine was of a gentler kind. In 1817 a panic prevailed among certain classes of politicians, owing to the idea that the principles of the French Revolution were taking root among the people; and amongst other repressive measures introduced to meet the occasion was the Seditious Meetings Bill. Erskine strenuously opposed it, saying, "If the authors of this Bill had the government of the seasons, they would, no doubt, set about a reformation upon their own system, and the elements of fire, water, and air would no longer have their immemorial liberties, but would be put under such politic restraints as we are now about to lay upon the civil world. To Air they would say, 'Be free as air; it is even a proverb, and we will support it; continue, therefore, to be as free as air, at least in our improved sense of freedom But not more than fifty clouds shall in future come together without an order from seven farmers or graziers; and if you shall presume to blight our fruit trees or destroy our harvests, you shall be driven back to your caverns by a single justice of the peace.'"

But irony is a weapon which must be used with caution, as is apparent from the following example. The author of it was more witty than wise, and if he has gained some credit with posterity for his ingenuity, it seems to have availed him very little in his own lifetime. In the case of *Everet v. Williams* the plaintiff and defendant were both highwaymen. The bill stated that Everet, the plaintiff, was skilled in

dealing in several commodities, such as plate, rings, watches, &c.; that the defendant applied to him to become a partner, that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads, and at inns, taverns, or alehouses, or at markets and fairs. Then it proceeded in these terms: "And your orator and Joseph Williams proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch: and afterwards Joseph Williams told your orator that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went and met with the said gentleman, and, after some small discourse, they dealt for the horse; that your orator and Joseph Williams continued their joint dealings together until Michaelmas, and dealt in several places—viz., at Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex, and elsewhere, to the amount of £2,000 and upwards." This effort of genius was condemned

by the court as scandalous and impertinent. The solicitor was brought into court and fined £50; he was afterwards convicted of robbing Dr. Lancaster, but reprieved and transported. Jonathan Collins, Esq., who signed the bill, was ordered to pay the costs; while the plaintiff was executed at Tyburn in 1730, and the defendant, five years later, met the same fate.

There is a popular belief that counsel use their opportunities for retort to the prejudice of those who are compelled to occupy the witness-box. There may be some truth in this, but, however just may be the complaint of witnesses, prisoners of the present time may congratulate themselves that they are not directly exposed to the questions and abuse of judges and counsel. Some centuries ago a good deal of bad wit was spent upon the occupants of the dock. When Henry VIII. made himself supreme head of the Church, More refused to take the oath acknowledging him as such, and was thereupon committed to the Tower. He would not, however, in so many words deny the King's supremacy, and hence there was a difficulty about bringing him to trial and execution. In this state of things, Rich, the Solicitor-General, paid him a visit in the Tower, and engaged him in conversation as follows:—

Rich: Admit that there were an Act of Parliament made that all the realm should take me for King: would not you, Mr. More, take me for King?

More: Yes, sir, that I would.

Rich: I put the case further—that there were an

Act of Parliament that all the realm should take me for Pope: would you not take me for Pope?

More: For answer to your first case—the Parliament may well meddle with the state of temporal princes; but to make answer to your other case—suppose that the Parliament should make a law that God should not be God, would you then, Mr. Rich, say so?

Rich: No, sir, that I would not, for no Parliament could make such a law.

This evidence was perverted and produced against More at his trial, yet the Attorney-General was not quite satisfied, and thus addressed the prisoner:—"Although we had not one word or deed to object to you, yet have we your *silence* when asked whether you acknowledge the King to be the supreme head of the Church—which is an evident sign of a malicious mind. But More retorted with effect, reminding his accuser of the maxim which held among the canonists and civilians—*Qui tacet consentire videtur.*

In the trial of Archbishop Laud for high treason, the following dialogue took place:—

Wild, Serjt.: Mr. Herne, we, on behalf of the Commons, never did allege that any one crime of the Bishop's did amount to a treason or a felony; but we do say that all the Bishop's misdemeanours put together do *by way of accumulation* make many grand treasons.

Herne: I crave your mercy, good Mr. Serjeant; I never understood before this time that two hundred couple of black rabbits would make a black horse.

In more modern times, Lord Eldon, with all his good humour, could turn and rend his persecutors with

great effect. In his later years he was very fond of presenting petitions against Catholic Emancipation. When he had presented one from the Glasgow tailors—

Lyndhurst (from the Woolsack): What! do tailors trouble themselves about such measures?

Eldon: No wonder; you can't suppose that tailors like turncoats.

Another petition being signed by a large number of ladies—

Lord King: Will the noble and learned Earl inform the House, as it may materially influence your Lordships' decision, whether this petition expresses the sentiments of young or old ladies?

Lord Eldon: I cannot answer as to the exact ages of these petitioners; but I am sure that there are many women, both young and old, who possess more knowledge of the Constitution and more common sense than some descendants of Lord Chancellors.

It is quite a mistake to suppose that advocates have anything like immunity from attack. They suffer severely at the hands both of witnesses and judges. Serjeant, better known as Bull, Davy had been a druggist before he was called to the Bar, but becoming bankrupt he abandoned the trade, and learnt his law in the King's Bench Prison. Many years after he took part in the following conversation, when cross-examining a woman at Exeter Assizes:—

Davy: Pray, good woman, how is it that you should be so particular as to remember that this affair happened on a market day?

Witness: Why, sir, by a very remarkable token—that all the cry of the city was that Mr. Davy, the drugster, had that morning shut up shop and run away.

The same Serjeant caught a Tartar in a gentleman who appeared in court to be responsible for the appearance of a debtor in the sum of £3,000. Davy cross-examined him in these terms :—

Davy: Now, sir, how do you make out that you are worth £3,000?

Gentleman: I have land amounting in value to £2,940.

Davy: That's all very well—but we want £60 more.

Gentleman: I have a note of hand of one Mr. Serjeant Davy, and I am in hopes that he will have honesty enough to settle it soon.

Lord Mansfield: Brother Davy, with *your* leave, I think we accept the bail.

But perhaps no cross-examiner ever got so neat a thrust as Lord Brougham received from Dr. Black, the editor of the *Morning Chronicle.* Brougham, who had been attacked in the columns of that journal, began by asking, "Now, Dr. Black, when you resolve to write down a public man, how do you set about it?"

Dr. Black: I never knew any public man written down, except *by himself.*

Judges have a great advantage in retort, except when matters proceed so far that outward decencies are disregarded. Jeffreys, of course, reigned supreme;

it was his province to be rude, and the slightest opposition utterly exasperated him. In the case of the Fellows of Magdalen, Dr. Fairfax wished to explain to the Ecclesiastical Commission why he had not signed the answer of the other Fellows:—

L. C. J. (thinking that he meant to submit): Ay, this looks like a man of sense, and a good subject; let's hear what he will say.

Fairfax: The matter does not lie in this court, but in Westminster Hall.

L. C. J.: You are Doctor of Divinity, but not of law.

Fairfax: I desire to know by what commission and authority you sit here.

L. C. J.: Pray, what commission have you to be so impudent in court? This man ought to be kept in a dark room. Why do you suffer him without a guardian? Why did you not bring him to me? Pray let the officers seize him.

Lord Mansfield had many passages of arms with the Serjeants of his day; the following dialogue gives some idea of the sharpness of the weapon with which he chastised them. Serjeant Sayer, having gone circuit as Commissioner in place of one of the judges, had the audacity in the beginning of the following term to move as counsel for a new trial in one of the causes which he had tried, and on the ground of misdirection by the judge:—

Lord Mansfield: Brother Sayer, there is an Act of Parliament which, in such a matter as was before you, gave you discretion to act as you thought right.

Sayer: No, my Lord, I had no discretion.

Lord Mansfield: You may be right, brother; for I am afraid even an Act of Parliament could not give you discretion.

Lord Ellenborough's retort upon Henry Hunt was exceedingly neat. Hunt was a demagogue, and suffered for his ambition by being prosecuted and found guilty of holding a seditious meeting. Being called up to receive sentence, he began by complaining that he had been accused of misleading the people by "dangerous eloquence."

Lord Ellenborough (in a very mild tone): Mr. Hunt, my impartiality as a judge calls upon me to say that those who accuse you of *that* do you great injustice.

As another instance of retort may be given a witticism of Lord Justice Knight Bruce. In the course of a long argument, counsel had made use of the familiar maxim, *expressio unius est exclusio alterius*, pronouncing the *i* in *unius* short—thus, *unĭus*. "*Unĭus*, sir!" exclaimed the Lord Justice, "we always pronounced it *unīus* at school." "Yes, my Lord, certainly it was so," was the reply; "but many of the poets have written *unĭus*." "That may be," retorted the judge, "but we are *prosing* here."

Killing retorts may be made by the use of happy quotations. Nothing could be more effective than the quotation employed by Wedderburn in a debate on the trials of controverted elections. The Attorney-General, De Grey, having said that "it was better to endure those evils of which we knew the extent,

than, in a sudden start of disgust and humoursome passion, 'fly to others which we know not of,'"

Wedderburn:

"'And thus the native hue of resolution
Is sicklied o'er with the pale cast of thought;
And enterprises of great pith and moment,
With this regard, their currents turn away,
And lose the name of action.'

"Thank God, this pale cast of thought hath not sicklied o'er the present House. The gentlemen who oppose this Bill acknowledge that there are other paths; but whenever reason, justice, honour, point the way, there in that very path the most ingenious are employed to set bugbears and phantoms—not only of dangers which we know not of, but of dangers which do not and cannot exist, which their ingenuity is at a loss even to describe."

When the celebrated green bag, which was supposed to contain the conclusive evidence of Queen Caroline's guilt, had been placed upon the table of the House of Lords, a debate arose with a view to postponing the disclosure of its contents. It was well known that the green bag would probably never have been heard of but for the bad advice of Sir John Leach, who had an idea of supplanting Lord Eldon on the Woolsack. In arguing in favour of delay, Lord Denman quoted most happily from Othello—

"Some busy and insinuating rogue,
Some cogging, cozening slave, to get some office,
Must have devised this slander."

Scarcely less happy, though perhaps less appreciated, was Brougham's reference to the fact that the proceedings taken against the Queen were animated by the King. He said: "After the assertion of my learned friend, I am bound to believe that this measure is not to gratify the wishes of the King, and that his Majesty looks on with indifference, solicitous only that 'right be done.' But who, then, is the prosecutor? Who is this mysterious being—

> 'that shape hath none
> Distinguishable in member, joint, or limb;
> Or substance may be called which shadow seems?
> —*What seems his head*
> *The likeness of a kingly crown has on.*'"

For passages of pure eloquence, which even in the pages of a volume of speeches stir the emotions, there is no language like that of Erskine. His famous reference to the Indian chief in his speech for John Stockdale, which, of its kind, is unrivalled in the English language, is perhaps too hackneyed for quotation here. But in the same speech occurs a passage still more effective, because it expresses the principles of religious toleration in language which disarms all controversy. Before such gentle persuasion the most truculent dogmatist would sit mute and incapable of retort. Thus he wound up his address:—"Upon the principle on which the Attorney-General prays sentence upon my client—God have mercy upon us!—instead of standing before Him in judgment with the hopes and consolations of Christians, we must call upon the moun-

tains to cover us; for which of us can present for omniscient examination a pure, unspotted, and faultless course? But I humbly expect that the benevolent Author of our being will judge us as I have been pointing out for your example. Holding up the great volume of our lives in His hands, and regarding the general scope of them, if He discovers benevolence, charity, and goodwill beating in the heart, where He alone can look; if He finds that our conduct, though often forced out of the path by our infirmities, has been in general well-directed, His all-searching eye will assuredly never pursue us into those little corners of our lives, much less will His justice select them for punishment without the general context of our existence, by which faults may be sometimes found to have grown out of virtues, and very many of our heaviest offences to have been grafted by human imperfection upon the best and kindest of our affections. No, gentlemen, believe me, this is not the course of divine justice, or there is no truth in the Gospels of Heaven. If the general tenor of a man's conduct be such as I have represented it, he may walk through the shadow of death, with all his faults about him, with as much cheerfulness as in the common paths of life; because he knows that instead of a stern accuser to expose before the Author of his nature those frail passages which, like the scored matter in the book before you, chequer the volume of the brightest and best-spent life, His mercy will obscure them from the eye of His purity, and our repentance blot them out for ever."

Lord Eldon used to call God and his conscience to witness to the propriety of his official and political acts; Lord Thurlow invoked Heaven with equal frequency, but rather with the object of concealing the fragility of his argument. Erskine seldom concluded an address at the Bar without conveying to the jury the impression that his client enjoyed the divine approval. The peroration of his speech for Lord George Gordon is exceedingly skilful. After alluding, according to custom, to divine providence, he runs over a list of topics to which he might have had recourse *in a doubtful cause;* but in disclaiming all intention to avail himself of them, on the insinuation that the case was not doubtful, he carefully draws them into the attention of the jury. "Surely," said he, "a good man might without superstition believe that the divine providence was watchful for the protection of innocence and truth. I may now, therefore, relieve you from the pain of hearing me any longer, and be myself relieved from speaking on a subject which agitates and distresses me. Since Lord George Gordon stands clear of any hostile act or purpose against the legislature of his country or the properties of his fellow-subjects; since the whole tenor of his conduct repels the belief of the *traitorous intention* charged by the indictment; my task is finished. I shall make no address to your passions, I will not remind you of the long and rigorous imprisonment he has suffered; I will not speak to you of his great youth, of his illustrious birth, and of his uniformly animated and generous zeal in Parliament for the Constitution

of his country. Such topics might be useful in the balance of a doubtful case; yet, even then, I should have trusted to the honest hearts of Englishmen to have felt them without excitation. At present the plain and rigid rules of justice and truth are sufficient to entitle me to your verdict."

CHAPTER IX.

AMENITIES.

Of Counsel—Of the Bench—Of the Bench and Bar—Of the Bench and the Public.

ENGLISH judges and counsel meet, as a rule, upon terms which are even more than cordial. They are bound together by the sentiment of professional brotherhood, which is stronger than the spirit of rivalry inseparable from the practice of their profession. There are, however, too many instances in which English lawyers have spent a vast amount of wit and sarcasm at the expense of each other. Of these, the celebrated feud between Bacon and Coke which lasted throughout the career of both, is perhaps the most interesting. Sir Edward Coke, being a man of great learning in the law but ignorant of liberal acquirements, was Attorney-General while Bacon was yet struggling for advancement. Both set their affections on Lady Hatton, a young widow with a large fortune, and, in spite of the arts and intrigues

of the wisest of mankind, Coke was successful in inducing her to run off and contract a clandestine marriage with him. He had little reason to congratulate himself on his success, and ever after he seems to have entertained a strong dislike for his rival —a feeling which was more than reciprocated. The first indication of the relations existing between them is gathered from a memorandum in Bacon's handwriting, which is headed with these words: "A true remembrance of the abuse I received of Mr. Attorney-General publicly in the Exchequer the first day of term; for the truth whereof I refer myself to all that were present." Bacon, it seems, had moved for a reseizure of the lands of one George Moore, and possibly in doing so he may have infringed upon the privileges of the Attorney-General. Coke at all events "kindled at it," and the following strange conversation took place:—

Mr. Attorney: Mr. Bacon, if you have any tooth against me, pluck it out; for it will do you more hurt than all the teeth in your head will do you good.

Bacon (coldly, in these very words): Mr. Attorney, I respect you; I fear you not; and the less you speak of your own greatness, the more I will think of it.

Coke: I think scorn to stand upon terms of greatness towards you, who are less than little—less than the least (and other such strange light terms, with that insulting which cannot be expressed).

Bacon: Mr. Attorney, do not depress me so far; for I have been your better, and may be again, when it please the Queen.

"With this," says the chronicler, "he spake, neither I nor himself could tell what, as if he had been born Attorney-General; and in the end bade me not meddle with the Queen's business, but with mine own; and that I was unsworn. I told him sworn or unsworn was all one to an honest man; and that I ever set my service first and myself second, and wished to God he would do the like."

Coke: It were good to clap a *capias utlegatum* on your back.

Bacon: You cannot, but are at fault, and hunt upon an old scent.

This last taunt referred to the fact that Bacon had spent some days in a sponging-house, at the instance of a usurer to whom he had given a bond for £300. Coke continued to give him "a number of disgraceful words besides," which Bacon, although he received them in silence, treasured up with a retentive and malignant memory, awaiting the time when it might please the Queen to make him again his adversary's better. He did, however, write, at the time, a letter of remonstrance, couched in the quaint but forcible language which he affected.

"MR. ATTORNEY,—I thought best, once for all, to let you know in plainness what I find of you, and what you shall find of me. You take to yourself a liberty to disgrace and disable my law, my experience, my discretion. What it pleaseth you, I pray, think of me: I am one that knows both mine own wants and other men's; and it may be perchance that mine mend and others stand at a stay. And surely

I may not endure in public place to be wronged, without repelling the same to my best advantage to right myself. You are great, and therefore have the more enviers, which would be glad to have you paid at another's cost. Since the time I missed the Solicitor's place (the rather I think by your means) I cannot expect that you and I shall ever serve as Attorney and Solicitor together; but either to serve with another upon your remove, or to step into some other course; so as I am more free than ever I was from any occasion of unworthy conforming myself to you more than general good manners or your particular good usage shall provoke. And if you had not been short-sighted in your fortune (as I think), you might have had more use of me. But that tide is passed. I write not this to show my friends what a brave letter I have written to Mr Attorney; I have none of those humours."

In course of time the tide did turn. Coke became Lord Chief Justice and Bacon Attorney-General; but, although they worked together at the table of the Council, the old enmity rankled in the bosom of one if not both of them. Bacon at this period was wont to complain to the King: "I dislike the riot and violence whereof we of the Council gave your Majesty advertisement, and I dislike it the more because he justifies it by law, which was his old song." On the subject of law Coke was his superior, and the Attorney-General felt himself occasionally at a disadvantage. Before long, however, he contrived to wound his adversary in his stronghold.

By degrees the patriotic and independent spirit of the old Chief Justice estranged him from the Court; he could not fall in with the statecraft of King James. And at last, thanks to the endeavours of Bacon, who openly avowed that he hoped to make a "Star Chamber business" of it, the Chief Justice was ordered, in place of going circuit, to "enter into a view and retractation of such novelties and errors and offensive conceits as were dispersed in his reports." The matter culminated in the dismissal of Coke; but before that conclusion was fully arrived at, he received an expostulation from his persecutor, which is a masterpiece of cool, cutting, and malignant satire:—

"Supposing this to be the time of your affliction, that which I have propounded to myself is, by taking this seasonable advantage, like a true friend, though far unworthy to be counted so, to show you your true shape in a glass; and that not in a false one to flatter you, nor yet in one that should make you seem worse than you are, and so offend you. . . . First, therefore, behold your errors. In discourse you delight to speak too much, not to hear other men; this some say becomes a pleader, not a judge. While you speak in your own element, the law, no man ordinarily equals you; but when you wander, as you often delight to do, you wander indeed, and give never such satisfaction as the curious time requires.

"Secondly, you clog your auditory when you would be observed. Speech must be either sweet or short.

"Thirdly, you converse with books, not men and

books especially human, and have no excellent choice with men, who are the best books; for a man of action and employment you seldom converse with, and then but with your underlings; not freely, but as a schoolmaster with his scholars—ever to teach, never to learn. But if sometimes you would in your familiar discourse hear others, and make election of such as know what they speak, you should know many of these tales you tell to be but ordinary, and many other things which you delight to repeat and serve out for novelties to be but stale. . . . You will jest at any man in public, without respect of the person's dignity or your own; this disgraceth your gravity more than it can advance the opinion of your wit, and so do all actions which we see you do directly with a touch of vainglory, having no respect to the true end. You make the law to lean too much to your opinion, whereby you show yourself to be a legal tyrant, striking with that weapon where you please, since you are able to turn the edge any way. Your too much love of the world is too much seen, where, having the living of a thousand, you relieve few or none. The hand that hath taken so much, can it give so little? Herein you show no bowels of compassion, as if you thought all too little for yourself. We desire you to amend this, and let your poor tenants in Norfolk find some comfort; where nothing of your estate is spent towards their relief, but all brought up hither to the impoverishing of your country. . . . And since you are fallen upon this rock, cast out the goods to save the bottom; stop the leaks and make towards

land; learn of the steward to make friends of the unrighteous mammon. You cannot but have much of your estate (pardon my plainness) ill-got. Think how much of that you never spake for; how much by speaking unjustly, or in unjust causes. Account it then a blessing of God if thus it may be laid out for your good, and not left for your heir." Sir Edward Coke, however, had the last laugh. His persecutor, having become in time Lord High Chancellor, fell into a corrupt administration of justice which proved his ruin; and Coke had the felicity of proposing the impeachment which ended in Bacon's disgrace and degradation. The great Common Lawyer, himself deprived of his judicial office, became a parliamentary leader, and a noble vindicator of the liberties of Englishmen; and died in a good old age, full of honour and distinction.

When Thurlow and Wedderburn were respectively Attorney and Solicitor-General, there seems to have been an equally antagonistic feeling between them, but they had the good sense to restrain it in public. Both, according to Townsend, "exercised considerable sway in the House of Commons, but in a perfectly distinct style and manner; the one the Ajax, the other the Ulysses of debate. The one, blunt, coarse, and vigorous, hurled hard words and strong epithets at his opponents in a tremendous voice, with a look and tone of defiance; the other elegant, subtle, and insinuating, arrayed his arguments in all the persuasive guises of rhetoric, and where he could not convince the reason or move the passions, sought to silence objections with

ironical pleasantry and bitter sarcasm." Lord Campbell gives an amusing account of the first passage of arms between the two, but as it comes from Wedderburn himself it must be taken for what it is worth. The dispute arose about the first State paper of the Solicitor-General, which Thurlow swore was too ill-done to be used or even corrected. It was a disgrace to both law officers, and he requested his subordinate to do it over again. This, of course, Wedderburn refused to do; whereupon the Attorney-General, swearing dreadfully, said that he was ashamed of it, and if he used it would say so. "Indeed, Mr. Attorney," was the reply, "you shall not say so, and it is better that we understand each other once for all. I will assist you to the utmost of my power; if you cannot use the papers I draw, then of course I may be unfit for my office, and you must do the work; but if you adopt my paper, it is no longer mine—it is yours, and must be yours, and yours alone." Finally the rugged Thurlow gave way, muttering petulantly, "Well, take it away—it will do as well as anything else, I suppose." According to Wedderburn they never had another difference during the period of their joint service. But if the same authority may be believed, Thurlow continued to have no particular good will towards his Solicitor-General. Many years after, when both were in the House of Lords, he was wont to say, "That Scotchman has the gift of the gab, but he is no lawyer; in the House of Lords I get Taffy Kenyon, or some one else who does my dirty work, to start some law

doctrine in such a way that the fellow must get up to answer it, and then I leave the Woolsack and give him such a thump in the bread-basket that he cannot recover his wind." But none the less, he sometimes winced under the Scotchman's sarcasm. Lord Eldon, who seems to have spent much time in telling and listening to stories about himself and the other law Lords of his day, used to say that on one occasion, when Thurlow was not equal to the usual thump on the bread-basket, he muttered to himself, "If I were not as lazy as a toad at the bottom of a well, I could kick that fellow Loughborough heels over head any day in the week." The advice also which he gave to Lord Lauderdale, who intended to attack Wedderburn, shows that he did not hold his adversary in contempt. "Don't, sir," he said; "if you do, he will come over you with his cold tongue." The distinguished lawyers of that time seem to have been continually occupied in mimicking and satirising each other. Successful imitations of Thurlow and Eldon were highly relished. Wedderburn is said to have excited much laughter by an imitation of Erskine. The besetting sin of that great advocate was his insufferable egotism, and he was represented by his mimic as introducing himself to a public meeting in these terms:—"As to me, gentlemen, I trust I have some right to give my opinion freely. Would you know whence my title is derived? I challenge any man among you to inquire! If he ask my birth—its genealogy may dispute with kings! If my wealth—*it is all for which I have time to hold out my*

hands. If my talents—no! of these, gentlemen, I leave you to judge for yourselves."

As between the Bench and Bar, there ought to be, and for the most part there is, on both sides great forbearance. Counsel have to resist being borne down by the weight and dignity of the judicial office; and, on the other hand, judges would be more than human if they submitted to all the trials which counsel at the Bar attempt to put upon them. Perhaps no incident is more expressive of the magnanimity of a great judge than what occurred in the argument of the case of *Rex v. Baillie.* Erskine was fourth counsel for the defendant; he had only been called to the Bar in the preceding term, and he spoke, for the first time, from the back row of the court. In the course of the exquisite speech, which at once established his reputation, he began to speak somewhat strongly of the authors of the prosecution, and it is reported in the shorthand writer's note that, "Here Lord Mansfield, observing the counsel heated with his subject and growing personal on the First Lord of the Admiralty, told him that Lord —— was not before the court." But the advocate continued, "I know that he is not formally before the court, but for that very reason I will bring him before the court. He has placed these men in the front of the battle, in hopes to escape under their shelter, but I will not join in battle with them; their crimes, though screwed up to the highest pitch of human depravity, are not of dignity enough to vindicate the combat with me. I will drag him to light, who is the dark mover behind this scene of

iniquity." Lord Mansfield, if he had chosen, might have quenched the ardour of this harangue, but he refrained. His indulgence was not abused, for he always received the utmost reverence and respect from an advocate who quailed before no judge. Thus we find Erskine concluding his argument for the Dean of St. Asaph in the King's Bench in these words:—"I am one of those who could almost lull myself from the apprehension of immediate mischief, even from the law of libel laid down by your Lordship, *if you were always to continue to administer it yourself.* I should feel a protection in the gentleness of your character; in the love of justice which its own intrinsic excellence forces upon a mind enlightened by science, and enlarged by liberal education; and in that dignity of disposition which grows with the growth of an illustrious reputation, and becomes a sort of pledge to the public for security; but such a security is as a shadow which passeth away: *you cannot, my Lord, be immortal, and how can you answer for your successor?*"

Lord Eldon used to win the affections of the counsel who practised before him by his exceeding good humour. According to Lord Campbell, he was once sitting at Lincoln's Inn, when an ancient but learned Chancery lawyer, known as "Hun" Hall, concluded a long argument by saying, "But now, my Lord, I find that I know no law." The Chancellor's reply was a good instance of his kindly disposition. "Mr. Hall," said he, "if you know no law, I can say of my own knowledge that you have forgotten

a great deal since I sat in those rows in which you now sit." A somewhat apocryphal story relating to this judge is told by the same biographer. It is said that at first he had a strong prejudice against Brougham, who sometimes appeared before him in the House of Lords as counsel in Scotch cases. Possibly from a malicious spirit—for judges have been known to play such tricks both before and since—he persisted in addressing the advocate as Mr. Bruffam. As it happened, Brougham was exceedingly proud of the form and antiquity of his name, and at last, in exasperation, sent a memorandum to the Chancellor by the hand of the assistant clerk to intimate that his name was pronounced "Broom." Of this Lord Eldon took full notice, and at the conclusion of the argument said: "Every authority upon the question has been brought before us; new Brooms sweep clean."

It is difficult for any person but judges themselves to understand how sorely their patience and temper are tried. With all his *bonhommie*, Lord Eldon was fully alive to the elements of provocation in the proceedings of counsel. Thus he wrote to his daughter:—"I have some and no small comfort today in having my organs of hearing relieved from the eternal din of the tongues of counsel. I am sometimes tormented by the noise of Lady Gwydir's Scotchmen playing under my windows upon the Scotch instrument vulgarly called the bagpipes; but there is music in that droning instrument compared to the battle of lawyers' tongues." Lord Lyndhurst

inclined to the same opinion, and actually enjoyed going circuit, declaring that it was "pleasanter to try larcenies and highway robberies than to listen to seven Chancery lawyers on the same side upon exceptions to the Master's report." He was an extremely courteous judge, but he boasted that he thought it his duty to make it disagreeable to counsel to talk nonsense. That duty cannot be successfully performed without tact, for counsel have been found to strongly resent the imputation, if they are told in so many words that they are talking nonsense. It would be idle to expect that war will not sometimes break out between the Bench and the Bar. On the one hand, old-fashioned judges like Mr. Justice Heath, who was always "on his guard against the 300-guinea gentry' —in other words, advocates specially retained—are practically primed for a hostile engagement. On the other hand, it would be too much to expect a hot-headed counsel like Brougham to remain unmoved when told, as he was, by Lord Ellenborough, in the trial of the Hunts, that he was "inoculated with the spirit of the libel."

Such pleasantries do not always proceed from the Bench. Judges on their part have had to meet the jibes of counsel uttered, not only in their own courts, but in Parliament. Lord Eldon was annually annoyed by the too well-justified motion of Mr. Williams in the House of Commons, touching the abuses existing in the Court of Chancery. Brougham occasionally joined in the hunt, and the following remarks made by him in a debate on Catholic

Emancipation proved that he was not to be addressed as "Bruffam" with impunity. "Of what are they afraid? What is their ground of alarm? Do they think he (Lord Eldon) would resign his office? That he would quit the Great Seal? Prince Hohenloe, the modern miracle worker, is nothing to the man who could work such a miracle. . . Nothing can equal the constancy with which he has borne the thwarts which he has lately received on the questions of trade. His patience, under such painful circumstances, can be rivalled only by the fortitude with which he bears the prolonged distress of the suitors in his own court; but to apprehend that any defeat would induce him to quit office is one of the vainest fears, one of the most fantastic apprehensions, that was ever entertained by man. Let him be tried. In his generous mind, expanded as it has been by his long official character, there is no propensity so strong as a love of the service of his country. He is, no doubt, convinced that the higher an office, the more unjustifiable it is to abandon it. The more splendid the emoluments of a situation, the more extensive its patronage, the more he is persuaded that it is not allowed to a wise and good man to tear himself from it. His present station the noble and learned Lord holds as an estate for life. That is universally admitted. The only question is, whether he is to appoint his successor."

In their own courts, judges have often to meet both acrimony and petulance in the members of the Bar. Some have a habit of writing letters during argument, a habit to which Lord Brougham, when

Chancellor, was much addicted. Sir Edward Sugden was extremely annoyed whenever he observed it, and on one occasion paused in his argument.

Brougham (still writing): Go on Sir Edward; I am listening to you.

Sugden: I observe that your Lordship is engaged in writing, and not favouring me with your attention.

Brougham: I am signing papers of mere form; you may as well say that I am not to blow my nose or take snuff while you speak.

Counsel sometimes speak with unusual freedom to the occupants of the Bench, and it is impossible to say that they are not occasionally compelled to do so in self defence. Lord Kenyon, when Chief Justice, was always supposed to have a partiality for the advocacy of Erskine. This disposition was severely felt by Law, who was generally retained on the other side in cases of expectation, and who at times indulged in open complaint. The partiality of the judge having been shown more pointedly than usual in a trial at the Guildhall, Law concluded his address to the jury in these terms:—"Perhaps, gentlemen, I may without arrogance assume that I have successfully disposed of the observations of my learned friend, and that the strong case I made for my client remains unimpeached. Still, my experience in this court renders me fearful of the result. I dread a power with which I am not at liberty to combat. *When I have finished, the summing-up is to follow.*" Turning to his adversary, he said,

"Non me tua fervida terrent
Dicta, ferox;"

Then with a bow to Kenyon, he added,

"Di me terrent, et Jupiter hostis."

A more direct charge of unfairness could not have been made; but Kenyon, although himself given to quoting, or rather misquoting, Latin, did not catch the drift of Law's meaning, and the occasion passed without a direct conflict between the judge and counsel.

The celebrated wrangle between Mr. Justice Buller and Erskine at the trial of the Dean of St. Asaph for a seditious libel shows how easily both judge and counsel may be provoked to transgress against each other. As the law was at that time understood by the judges, Buller was clearly in the right; but Erskine, although provoking, had behaved with perfect courtesy until he was attacked. The friends of liberty had struggled hard to have the law declared to be that juries should determine whether particular words were libellous or not; but the judges chose to confine the province of the jury to finding the publication and the proof of the innuendoes. In this they were quite wrong, but being the dispensers of law they could not be controlled except by legislation. In the Dean of St. Asaph's case the jury, having retired to consider their verdict, and after half-an-hour's absence returned into court, the following scene took place:—

Clerk: Gentlemen of the jury, do you find the defendant guilty or not guilty?

Foreman: Guilty of publishing only.

Erskine: You find him guilty of publishing only?

A Juror: Guilty only of publishing.

Buller, J.: I believe that is a verdict not quite correct. You must explain that one way or the other. The indictment has stated that G. means Gentleman, F.—Farmer, the King—the King of Great Britain, and the Parliament — the Parliament of Great Britain.

Juror: We have no doubt about that.

Buller, J.: If you find him guilty of publishing, you must not say the word "only."

Erskine: By that they mean to find there was no sedition.

Juror: We only find him guilty of publishing; we do not find anything else.

Erskine: I beg your Lordship's pardon; with great submission I am sure I mean nothing that is irregular. I understand they say, "We only find him guilty of publishing."

Juror: Certainly, that is all we do find.

Buller, J.: If you only attend to what is said there is no question or doubt.

Erskine: Gentlemen, I desire to know whether you mean the word "only" to stand in your verdict.

Juror: Certainly.

Buller, J.: Gentlemen, if you add the word "only" it will be negativing the innuendoes.

Erskine: I desire your Lordship, sitting here as judge, to record the verdict as given by the jury.

Buller, J.: You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment.

Juror: Certainly.

Erskine: Is the word "only" to stand part of the verdict?

Juror: Certainly.

Erskine: Then I insist it shall be recorded.

Buller, J.: Then the verdict must be misunderstood; let me understand the jury.

Erskine: The jury do understand their verdict.

Buller, J.: Sir, I will not be interrupted.

Erskine: I stand here as an advocate for a brother citizen, and I desire that the word "only" may be recorded.

Buller, J.: Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner.

Erskine: Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship know yours. I shall not alter my conduct.

Buller certainly made the mistake of losing his temper. A gentle irony such as Lord Mansfield practised upon his Serjeants would have been far more effectual. But even Lord Mansfield had at times to accept some hard strokes. Having, on one occasion, interrupted Serjeant Davy in the course of an argument which he was not disposed to agree with, he said, "If this be law, sir, I must burn all my books." The retort was difficult to parry. "I hope," said Davy, "that your Lordship will read them first." Serjeant Hill was the most frequent object of the irony of the Chief Justice. The following story is given in the "Anecdote Book":—

"Mr. Serjeant Hill began an argument in the

King's Bench in my hearing thus: 'My Lord Mansfield and Judges, I beg your pardon.'—'Why, Brother Hill, do you ask our pardon?'—'My Lords,' said he, 'I have seventy-eight cases to cite.'—'Seventy-eight cases to *cite!*' said Lord Mansfield. 'You can never have our pardon if you cite seventy-eight cases.'

"After the court had given its decision upon the case (which was against the Serjeant's client) Lord Mansfield said: 'Now, Brother Hill, that the judgment is given, you can have no objection on account of your client to tell us your real opinion, and whether you don't think we are right. You know how much we all value your opinion and judgment.' The Serjeant said 'he very much wished to be excused; but he always thought it his duty to do what the court desired; and, upon his word, he did not think there were four men in the world who could have given such an ill-founded judgment as the four judges seated before him had pronounced.'"

On the one hand judges are sorely tried in their endeavours to make it disagreeable to counsel to talk nonsense; but there is another side of the question, and to that Serjeant Hill was painfully alive. With a certain amount of truth, he was wont to say, "When judges are about to do an unjust or absurd action, they seek for a precedent, in order to justify their own conduct by the faults of others."

There is a wonderful freemasonry among judges, which makes them as a rule combine to assist and sustain each other as far as is possible. An instance of their mutual dependence and reliance may be taken from

Romilly's Diary, in which he discusses the appointment of Erskine to the Woolsack. Referring to the new Chancellor, he writes :—"He acts, indeed, very ingenuously on the subject; he feels his unfitness for the office, and seems almost overcome with the idea of the difficulties which he foresees that he will have to encounter. He called on me a few days ago, and told me that he should stand in great need of my assistance, that I must tell him what to read, and how best to fit himself for his situation. 'You must,' these are his very words, '*You must make me a Chancellor now, that I may afterwards make you one.*'" But it must not be supposed that this good feeling is universal. If there is no open conflict on the Bench, it is not because animosity does not exist; and in the House of Lords, where the judicial tongue was not in former days as securely bridled as on the Bench, there have been many interesting passages of arms. On one occasion, during the session of 1833, Lord Brougham, in charging Lord Lyndhurst with over-indulging his fancy, said that he had fallen into an inaccuracy "which would have done honour even to the late Chief Justice of the Common Pleas himself" (Lord Wynford).

Lord Wynford: I have submitted to this for a long time, but I will not be held up to ridicule in this way any longer. (Cries of "Order, order.")

The Lord Chancellor: My noble and learned friend, the late Chief Justice is most disorderly no doubt, but I do not complain. When I speak of his inaccuracy or forgetfulness I merely mean that he has forgotten, or

perhaps has never read, the books he refers to. I was not holding up to ridicule my noble and learned friend the late Chief Justice. It was no holding up of mine, and I hope my noble and learned friend, the late Chief Justice, will bear in mind what Dean Swift said of persons who were laughed at——

Lord Wynford: I will bear this no longer. The noble Lord has attacked me by name. He who is appointed to enforce the orders of your Lordships' House is ignorant of them, or wantonly breaks them. I move that the Clerk do now read the fifteenth of your Standing Orders, which requires all "personal, sharp, or taxing speeches to be forborne."

The Standing Order was read, which goes on to say—"and as nothing offensive is to be spoken, so nothing is to be ill taken, if the party that speaks it shall presently make a fair exposition of the words that might bear an ill construction; and if any offence be given in that kind, the House will sharply censure the offender, and give the party offended a fit reparation."

Lord Chancellor: Well, my Lords, if my words might bear any *ill construction*, have I not presently made a fair exposition of them? This being so, my Lords, I am the party offended; and my noble and learned friend, the late Chief Justice, being the offender, ought to be sharply censured by your Lordships, and is bound to give me a fit reparation.

The same turbulent spirit fell foul of many other law Lords. It is well known that in a speech made

at the Temple he accused Lord Campbell, who had just published his "Lives of the Chancellors," of adding a new terror to death. Lord Campbell tells an amusing story which shows that he could retort with effect upon his noble and learned friend. He says that he called one morning upon Brougham at his house in Grafton Street, who "soon rushed in very eagerly, but suddenly stopped short, exclaiming, 'Lord bless me, is it you? They told me it was Stanley;' and notwithstanding his accustomed frank and courteous manner, I had some difficulty in fixing his attention. In the evening I stepped across the House to the Opposition Bench, where Brougham and Stanley were sitting next each other, and, addressing the latter in the hearing of the former, I said, 'Has our noble and learned friend told you the disappointment he suffered this morning? He thought he had a visit from the Leader of the Protectionists to offer him the Great Seal, and it turned out to be only Campbell come to bore him about a point of Scotch law.' *Brougham:* 'Don't mind what Jack Campbell says; he has a prescriptive privilege to tell lies of all Chancellors, dead and living.'"

According to the same authority, Brougham was at one time very anxious to be made an Earl, but his desire was entirely quenched when Lord John Russell gave an earldom to Lord Chancellor Cottenham. He is said to have been so indignant that he either wrote or dictated a pamphlet in which the new creation was ridiculed, and to which was appended the significant motto, "The offence is rank."

Occasionally judges find themselves in conflict with members of the public who are under no professional privilege or restraint. Some maintain their dignity by fining and committing for contempt of court. This course may in some cases be necessary, but a delicate ridicule is generally much more effective. A troublesome attorney, who was pleading his own cause and raising untenable points before Lord Ellenborough, became exasperated because he was invariably overruled, and exclaimed, "My Lord, my Lord, although your Lordship is so great a man now, I remember the time when I could have got your opinion for five shillings." Such impertinence would, with many judges, have led to the committal of the offender; but Lord Ellenborough merely observed, with an amused smile, "Sir, I dare say it was not worth the money." The same judge was on one occasion sitting at the Guildhall, when Henry Hunt, the famous demagogue, appeared upon the floor of the court. Mr. Justice Talfourd describes the scene which followed in these terms:—"'I am here, my Lord, on the part of the boy Dogood,' proceeded the undaunted Quixote. His Lordship cast a moment's glance on the printed list, and quietly said, 'Mr. Hunt, I see no name of any boy Dogood in the paper of causes,' and turned towards the door of his room. 'My Lord,' vociferated the orator, 'am I to have no redress for an unfortunate youth? I thought your Lordship was sitting for the redress of injuries in a court of justice.' 'Oh! no, Mr. Hunt,' still calmly responded the judge; 'I am sitting at Nisi Prius; and I have no right to re-

dress any injuries except those which may be brought before the jury and me in the causes appointed for trial.' 'My Lord,' then said Mr. Hunt, somewhat subdued by the unexpected amenity of the judge, 'I only desire to protest.' 'Oh! is that all?' said Lord Ellenborough; 'by all means protest, and go about your business.' So Mr. Hunt protested and went about his business; and my Lord went unruffled to his dinner, and both parties were content."

Great judges have always been the objects of intense respect and veneration to the English people, and few ordinary persons would venture to dispute without diffidence the law which they lay down. There is perhaps no more amusing or flagrant abuse of this confidence in judicial acquirements than the proceedings of Sir Edward Coke when he went in search of his daughter. He had lived for years on very bad terms with his wife, who, when he proposed to marry their only daughter to Sir John Villiers, carried her off and concealed her at a house at Oatlands belonging to the Earl of Argyll. Coke, receiving information of this, collected a band of armed men and put himself at their head. Encased in a breastplate, with a sword at his side, and pistols at his saddle-bow, he arrived with his followers at the outer gate of the house, where he repeatedly demanded his daughter in the King's name, *laying it down for law* that if death should ensue it would be justifiable homicide in him, but murder in those who opposed him. Such an opinion coming from so inspired a source was enough to cause the most resolute garrison to tremble, and the

result was that Coke recovered his daughter without much difficulty.

Some judges cannot co-operate with juries. Mr. Baron Alderson was exceedingly impatient with a stupid jury, and often made his thoughts plainly known to them. A jury in a criminal case having returned a verdict which displeased him, he turned to the Sheriff, saying, "Good heavens, sir, can't I have another jury, and let these twelve persons go into the other court, where they can't do so much mischief?" To the disobedient jury he said, "Gentlemen, you will find in the other court, perhaps, in the course of the day, something which you can try." Then, in an absent, musing manner, he soliloquised, "No doubt there are some men who never can comprehend what evidence is; but that *twelve such men should come together* to-day and let that man off! Prisoner," to the happy man who had been acquitted, "the jury have acquitted you. Heaven knows why! No one else in the court could have the slightest doubt of your guilt, which is of the grossest kind; but you are acquitted, and I can't help it."

Juries are apt to follow almost too slavishly the opinions expressed by the Bench; not unfrequently, however, it does happen that they return verdicts contrary to what the judge who summed up the case has indicated. And sometimes the verdict is right, when the summing up of the judge is wrong.

From all these incidents it is clear that a judge is a person who cannot deal with ordinary mortals without tact and temper; and it is equally clear that those

who purpose to beard him in his own den have need to consider well what they are about. He is the victim of two passions—a zeal for justice, and a jealousy of the dignity of his office—and these two passions frequently combine to make him suspicious and irritable. Seated on the Bench, he occupies a position of advantage, from which he can deal compliments and rebukes with equal effect. But, as we have seen, he does not have it all his own way. Contention is the essence of litigation, and when strong spirits clash, whether they be clothed in ermine, silk, or stuff, or in the garb of ordinary men, there will always be a strong contest of wit. The highest wit, however, is not that which a man wastes upon his adversary. The personality of retort may give it a momentary piquancy, but the wit which deserves to last is that which is interwoven with wisdom, and the pure object of which is truth.

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